

Nos. 12070-1

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12070.

MYRON L. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

No. 12071.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

APPENDIX TO REPLY BRIEF OF APPELLEE.

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APPENDIX.

I.

Excerpts From Congressional Debates.

(1) SUMMARY OF LEGISLATIVE HISTORY OF THE PORTAL-TO-PORTAL ACT.

Almost immediately upon the convening of the present Congress both Houses took up the problem confronting the nation from the rising flood of so-called portal-to-portal suits. The Senate Judiciary Committee drafted a bill which dealt only with existing claims. Before the Senate acted upon the bill drafted by its committee, the House passed its bill, H. R. 2157 (hereinafter referred to as the "House Bill"). Section 3 of the House Bill provided:

"Sec. 3. No action or proceeding of any kind whether or not commenced prior to the effective date of this act, shall be maintained to the extent that such action is based upon failure of an employer to pay an employee for activities heretofore or hereafter engaged in by such employee other than those activities which at the time of such failure were required to be paid for either by custom or practice of such employer at the plant or other place of employment of such employee or by express agreement at the time in effect between such employer and such employee or his collective-bargaining representative."

93 *Cong. Rec.* 1621 (February 28, 1947).

When the House Bill reached the Senate, the Senate Judiciary Committee amended it by striking out nearly all of its provisions and substituting those of the bill which it had drafted (hereinafter referred to as the

“Senate Amended House Bill”). Section 2(a) of this Bill provided:

“Sec. 2. Relief from portal-to-portal claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey and the Bacon-Davis Acts:

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act or the Bacon-Davis Act on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activities of an employee engaged in prior to the date of enactment of this act, except those activities which were compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

For the purposes of this section, no judicial or administrative interpretation of the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act shall have the effect of changing any written or nonwritten contract between the employer and employee so as to make compensable any portal-to-portal activities (as defined in section 5); nor shall any provision of any such contract, incorporating by reference as a part thereof such judicial or administrative interpretations,

make compensable any such portal-to-portal activities.”

93 *Cong. Rec.* 2454 (March 21, 1947).

The Senate Amended House Bill passed the Senate, but was rejected by the House. It was then referred to a conference of the two houses, which wrote the bill that was passed by both Houses and is now before the Court. The conference report to the Senate is found in 93 *Cong. Rec.* 4501-4502 (May 1, 1947). The Report of the Conference Committee, in Section 2(a), relating to existing claims, adopted in substance the provisions of Section 3 of the House Bill and Section 2(a) of the Senate Amended House Bill.

(2) DEBATES ON THE CONFERENCE REPORT ON THE BILL
ADOPTED BY BOTH HOUSES.

*Excerpt From Senator Wiley's Presentation to the Senate
of the Conference Report.*

93 *Cong. Rec.* 4501 (May 1, 1947):

“Mr. President, the conference committee adopted in its report the provisions of both the House and Senate versions of House bill 2157, in substance, with respect to past claims. In other words, the conference report in relation to past claims, adopts the theory of both the Senate and the House versions of the bill

* * * * *

“Mr. President, that is all I have to say in regard to the conference report, except to compliment the conferees, who worked like yeomen, night and day, until finally their minds met and agreement was reached on what I consider to be a constructive piece of legislation, which will result in advancing the economic health of this Nation.”

93 *Cong. Rec.* 4501 (May 1, 1947).

Excerpts From Statements of Mr. Hinshaw and Mr. Walter During Discussion in the House on the Report of the Conference Committee.

93 Cong. Rec. 4515 (May 1, 1947):

“Mr. Hinshaw. The gentleman remembers the cases known as the stand-by cases which were brought out before his committee in which certain employees might be called upon at some time not during their regular working time to perform some duty and that many suits for wages have been instituted under that type of claim. Is that provided for in the present bill?

“Mr. Walter. Yes; we feel that under the language of section 2(b) of this bill that type of arrangement is covered and that the employer is not liable.

“Mr. Hinshaw. The case I had in mind was one where there were certain persons who were left to guard electrical distribution stations where they were given a house and so forth and perhaps performed one or two labors per day and yet were paid on a monthly basis. Large suits were brought for time and a half for an additional 8 hours per day pursuant to the ruling of the court.

“Mr. Walter. We hope that we have met that situation and all of the situations that have been brought to our attention, because we had in mind that all of these portal-to-portal suits are in the nature of windfalls. None of the plaintiffs—and I say that advisedly—ever felt they were entitled to compensation for activities which are the basis of these suits. I think I should add to what I said about the defense of good faith.”

93 Cong. Rec. 4515 (May 1, 1947).

*Excerpts From Statements of Mr. Gwynne and Mr. Pace
During Discussion in the House on the Report of
the Conference Committee.*

93 Cong. Rec. 4514 (May 1, 1947):

"Mr. Pace. It was not entirely clear to me on the portal-to-portal pay what was done with the future handling of those claims that immediately precede the moment of employment, not the walking and the riding, but the preliminaries to start work. What position did the committee of conference make of that type of claim?

"Mr. Gwynne of Iowa. That type of portal-to-portal claim is barred. *In existing claims, the entire thing is barred*, even though the so-called portal-to-portal claim may arise in the middle of the day, during the hours for which the man is employed. In future claims riding or walking or travel to the principal place of employment is barred, and barred with it are preliminary activities and postliminary activities.

"Mr. Pace. Even though it involves the laying out of work the man is going to undertake in the next few minutes, the laying out of garments to work on, that claim would be barred?

"Mr. Gwynne of Iowa. It is barred *unless there was an agreement or custom to pay for it*.

"Mr. Pace. Does the gentleman think that should be handled through collective bargaining?

"Mr. Gwynne of Iowa. No. The whole thought is that those claims *are all barred*, I mean as to existing claims as to activities for which the employer has not agreed to pay.

“Mr. Pace. I understand that, but I mean in the future; it is barred in the future unless there is an agreement between the employer and the employee?”

“Mr. Gwynne of Iowa. *An agreement or custom.*”
93 Cong. Rec. 4514 (May 1, 1947).

*Excerpt From Statement of Mr. Michener in Reporting
the Conference Bill to the House.*

93 Cong. Rec. 4513 (May 1, 1947):

“The first part of the bill has to do with existing portal-to-portal claims which you will recall are defined as causes of action or claims seeking pay for activities which activities at the time they were performed were not compensable, *either by custom or practice in the place of employment, or by contract between the employer and the employee or his representative.*

“The bill as it comes from the conference *bans all existing claims of such character.*

“It provides that the courts have no jurisdiction to to entertain suits or enter any judgment whatever in this type of case. That is substantially the same as the original House provision.”

93 Cong. Rec. 4513 (May 1, 1947).

*Excerpt From Statement of Senator McGrath Opposing
the Report of the Conference Committee.*

93 Cong. Rec. 4501 (May 1, 1947):

“But I wish to call the attention of the Senate and of the country to the fact that this measure goes far beyond the field of portal-to-portal legislation.”

93 Cong. Rec. 4501 (May 1, 1947).

(3) EXCERPTS FROM DEBATES ON THE SENATE AMENDED
HOUSE BILL.

*Excerpt From Remarks of Senator O'Mahoney Before
the Senate in Opposition to the Senate Amended
House Bill.*

93 Cong. Rec. 2434 (Mar. 21, 1947):

In referring to a section of that bill substantially identical to Section 2(a) of the Portal Act as enacted, Senator O'Mahoney said:

"I call attention to the phrase in line 5, of page 11, 'on account of any activities.' If that means anything, it means precisely that there shall be no compensation with reference to minimum wage, or for overtime in connection with any activity—not simply any portal-to-portal activity because the phrase 'portal-to-portal activities' is not used; it says 'any activities'—unless those activities come within the exception set forth in clauses 1 and 2."

93 Cong. Rec. 2434 (Mar. 21, 1947).

*Excerpts From Remarks of Senators Cooper and Barkley
Before the Senate During Discussions of the Senate
Amended House Bill H. R. 2157.*

93 Cong. Rec. 2428-2429 (Mar. 21, 1947):

"Mr. Cooper. I think the distinguished Senator knows that I am always impressed by his remarks. However, I gathered from the illustration which he propounded that there was a question in his mind as to what would be the status of an employee who was required to report for his work some time before the beginning of his regularly scheduled hours to perform certain activities, and whether or not he would receive pay for such activities. Is that correct?

“Mr. Barkley. That is correct, subject to the further observation that, of course, if he has a contract, either written or unwritten, or if there has been a practice or custom—whether it is immemorial or short-lived—he would be entitled to pay. But without a contract, either written or unwritten, and without a custom having prevailed or a practice having been indulged in in that plant, in the future he would not, as I understand, be entitled to recover, because that work would be regarded as portal-to-portal activity, compensation for which is sought to be barred by the bill.

* * * * *

“Mr. Barkley. I thank my colleague. However, I get the very strong impression, if I am mistaken I wish to be corrected, from reading the bill and the report, and listening to the discussion, that under the definition of portal-to-portal activities, unless there is a contract, written or unwritten, or a custom under which such activities are compensable, all preliminary and postliminary work required by an employer is noncompensable.

* * * * *

“Mr. Barkley. It is necessary to go from the section which undertakes to define portal-to-portal back to section 2 to find out what the authors are talking about; and when we get back to section 2 we find that portal-to-portal *means anything which is not covered by contract or by custom or practice.*”

Excerpt From Remarks of Senator Cooper Before the Senate During Consideration of the Senate Amended House Bill.

93 *Cong. Rec.* 2372 (Mar. 20, 1947):

"I stated that it was the understanding and belief of the committee that probably no bill could be written affecting existing claims which would not impose some inequities. It becomes a matter of balancing interests or balancing the necessity of eliminating and invalidating this large volume of portal-to-portal claims which I believe everyone admits should, in the public interest, be invalidated against an unknown and undetermined inequities which might result from the committee bill or from the pending amendment. As an example I stated that prior to the enactment of the Fair Labor Standards Act an employee in a garment factory had periods of inactivity during the day. She might have a contract which provided that she should receive compensation only for actual work performed during the day, and she would not be paid for the periods of inactivity. But after the enactment of the Fair Labor Standards Act the interpretation of the Wage and Hour Administrator was that she should receive such pay. Obviously, under our bill or under the amendment, if she had not previously received payment for such periods of inactivity, she would not be able to assert a claim for pay for similar periods, worked prior to the enactment of the pending bill, unless covered by contract or custom."

93 *Cong. Rec.* 2372 (Mar. 20, 1947).

Excerpt From Statement of Senator Cooper Before the Senate During Consideration of the Senate Amended House Bill.

93 Cong. Rec. 2370, 2371 (Mar. 20, 1947):

"Since this debate started the senior Senator from Illinois [Mr. Lucas], the Senator from Massachusetts [Mr. Lodge], and the Senator from Vermont [Mr. Aiken] have propounded questions to this effect: In providing as to existing and past claims that no activity shall be compensable except by custom or contract, does the committee bill go further than that? Does the committee bill strike down and make noncompensable some activities which have been compensable under the Fair Labor Standards Act prior to the Mount Clemens decision?

"I shall be perfectly honest in answering that question in the Senate today. I say that that question must be answered in the affirmative, because when we provide that no activity shall be compensable except by custom or contract, it is certain that there have been activities performed in past years, within the statute of limitations, which were not under custom or contract, and yet were made compensable under the Fair Labor Standards Act."

* * * * *

"Under the bill as reported by the committee the true portal-to-portal time, payment for which was first allowed in the Mount Clemens case, would not be compensable. Again, some of the activities which, prior to the enactment of this bill, had been held under interpretations of the Wage and Hour Administrator to be compensable, would also be excluded. Finally, *the only claim which could be pursued to judgment under the committee bill would be a claim involving activities under custom or contract.*"

93 Cong. Rec. 2370, 2371 (Mar. 20, 1947).

Excerpt From Argument of Senator Wherry Before the Senate in Favor of the Senate Amended House Bill.

93 Cong. Rec. 2269 (Mar. 18, 1947):

"These three decisions [*Tennessee Coal Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U. S. 590, 88 L. Ed. 949, *Jewell Ridge Coal Corporation v. Local No. 6167*, U. M. W., 325 U. S. 161, 89 L. Ed. 1534, *Anderson v. Mt. Clemens Pottery Co.*, 328, U. S. 680, 90 L. Ed. 1515] have completely distorted the congressional intent as the dissenting judges in those cases, as well as the judges in the lower courts, have forcibly pointed out. Thus, in the Tennessee Coal and Iron case, Mr. Justice Roberts, who was joined in his dissent by Chief Justice Stone, stated:

" 'The Fair Labor Standards Act was not intended by Congress to turn into work that which was not work, or not so understood to be, at the time of its passage. It was not intended to permit courts to designate as work some activity of an employee, which neither employer nor employee had ever regarded as work.'

"Justices Roberts and Stone characterized the Court's decision in this case by quoting the words of Judge Sibley, who had dissented in the circuit court of appeals—

" 'The injustice of * * * is shocking.'

"These three decisions, and particularly the decision in the Mount Clemens Pottery case, have had disastrous results. The Fair Labor Standards Act was passed by Congress for two specific purposes:

"The first was to require employers to pay employees a decent minimum wage for their work.

"I certainly am in total agreement with that provision.

“The second purpose was to discourage excessive hours of work by requiring employers to pay overtime after 40 hours of work in any one workweek.

“The Congress obviously intended that the question of what was work was to remain exactly as it was before the act was passed, and merely to require that such work be compensated in accordance with the minimum wage and overtime provisions of the act.

* * * * *

“The House bill simply provides that there shall be *no liability for so-called portal-to-portal activities in the past or the future*, except where such activities are required to be paid for, *either by contract or custom or practice*. *I think that is a short, positive statement of what the bill provides—and it provides it all the way around the clock.*

“The Senate bill takes care of the portal-to-portal problem as to the past, but it does not fully take care of the problem for the future.”

93 Cong. Rec. 2269 (Mar. 18, 1947).

Discussion Between Senators Tydings and Donnell Before the Senate During Consideration of the Senate Amended House Bill.

93 Cong. Rec. 2196-2197 (Mar. 17, 1947):

“Mr. Donnell. I dislike to interrupt the Senator, but, in the interest of accuracy, we say that if there is a custom or practice, not inconsistent with the contract of the individual, under which custom or practice payment was made for certain activities, the employees shall be entitled to compensation for them, whereas we provide conversely that in the absence of such custom or practice, they shall not be so entitled.

“Mr. Tydings. Particularly, I think the committee makes this broad approach—and I ask the Senator to correct me if I am wrong—that if payment has been made in the past as a matter of custom, or if payment for portal-to-portal activities is provided for in the contract, the committee bill makes no change, and does not prescribe payment for work in either of those two categories.

“Mr. Donnell. That is correct.

“Mr. Tydings. It is in the ‘twilight zone,’ so to speak, where payment has not been made in prior practice, and where payment is not provided for in the contract, and therefore the question arises as to whether or not in good faith the employer and the employee assume that payment could be made under the Wages and Hours Act, in that twilight zone? That is primarily I believe the place from which most of these suits have sprung, from the twilight zone, rather than practice or contractual obligation; and it is particularly in that twilight zone that the committee is attempting now to legislate to clear up that matter. Is that a broad statement of the situation?

“Mr. Donnell. I appreciate that one man may use an expression differently from the way another man uses it. I do not regard it as a ‘twilight zone.’ I should say that recognizing the grave economic problem, what we do is to *undertake to wipe out all pending portal-to-portal cases, so far as it is humanly possible to do so*. In order to do that, we find it necessary to provide that any activity which is not compensable, either by contract, or by custom or practice not inconsistent with the contract, shall not be compensable. Does that answer the Senator’s question?

“Mr. Tydings. That pretty well answers it, because, although I take it the committee might like to have considered each case all over the country on its merits, in the nature of things it had to take action,

and the fairest way it could act in the interest of employer and employee was to take the cases that came in the real category of right, and put them to one side, and in all the questionable cases, as to who was right and wrong, which were not covered by contract or were not covered by prior practice, the committee said, 'We will knock all these out, because it is impossible to run a line through all of them with exact justice.'

"Mr. Donnell. I think the Senator has very clearly stated the situation."

93 *Cong. Rec.* 2196-2197 (Mar. 17, 1947).

(4) EXCERPT FROM DEBATES ON THE HOUSE BILL.

Excerpt from the Minority Report on the House Bill to the House of Representatives, From Its Judicial Committee.

93 *Cong. Rec.* A975 (Mar. 10, 1947):

"The bill reported favorably by the majority proposes to bar for the past and the future any action based on the failure of an employer to pay legally required compensation for any specific activities if those activities are not required to be compensated by the 'custom or practice' of the employer or by agreement between the employer and his employee or between the employer and a collective-bargaining agent.

* * * * *

"We would favor a provision writing into the law a definition of 'work'. Such a provision would require that in order to be deemed compensable under the law activities must be conducted under the control, direction, or requirement of the employer and must be primarily for the benefit of the employer."

93 *Cong. Rec.* A975 (Mar. 10, 1947).

II.

Excerpts From Depositions of Appellants Cited or
Referred to in Appellee's Brief.

(1) PRIMARY SERVICEMEN.

J. D. BORDEN.

[P. 10, lines 6-20]:

Q. I am limiting my questions entirely to the time that you became a permanent primary service man. A. I see.

Q. Now at that time, as I understand it, there were two shifts, one from 7:00 until 3:30 and one from 3:30 to 11:00? A. One from 3:00 to 11:30 at that time.

Q. And one from 3:00 to 11:30? A. Yes. It has been changed twice since then. There is a slight variation since that time.

Q. Do you recollect now which shift you worked on; or did you work on both of them?

A. We alternated all the way through. To begin with, we alternated every four weeks, and now we alternate every four or five weeks as the case may be.

[P. 11, lines 15-26]:

Q. Now, when you were on shift from 7:00 to 3:00—or 3:30 did you say? A. 7:00 to 3:30, yes.

Q. And then from 3:00 to 11:30? A. Yes.

Q. What time off was allowed you for lunch on your first shift? A. Well, they never set a definite time on either shift for the lunch period. They just said any half-hour period that we were free we could eat lunch.

Q. You were allowed a half-hour? A. That is right, yes, sir.

[P. 16, lines 9-26]:

Q. Now, what do you mean by your standby? A. That is time that I stand by at home by the telephone to

take any emergency orders which might come over the phone and which I would be required to take care of.

Q. Well, were you required to stay at your home? A. Yes, sir; I was required to stay at home. In fact, long before I became a permanent appointee, when I was doing relief work, I was told to get a telephone so that I could be able to stand by.

Q. Weren't you also told that if you went to anybody else's house or place to leave your telephone? A. I was never told that. I understand they did it in some districts, but I was never given permission to do that.

Q. Was anything ever said about that? A. No, sir, not to me.

Q. Was anything ever said one way or the other on it? A. Not to me, no, sir.

[P. 19, lines 16-26]:

Q. Was there any discusison at all about overtime when you took this position, or the salary that you were getting as a trouble man? If you don't recollect, you can say so. A. I don't remember, but it was understood that I was still to get time and one-half for any overtime worked, any call-outs that I was called out on.

Q. You didn't understand, when you went to work, that you got any overtime for any standby unless you were called on to perform some actual service, did you? A. No, sir; only for actual service called on.

[Pp. 20/22, lines 16/3]:

Q. By Mr. Sterry: Let me put it more simply. You received a salary of \$225 a month, didn't you? A. That is right.

Q. And you understood that was all you were going to get unless you actually did something after your eight hours of work? A. Yes. I was given to understand

that that would be all I would get unless I got overtime which I would be called on for.

Q. That is what I am getting at. You didn't understand that you would get anything for that standby time if you didn't have any trouble call? A. No; I wasn't told that I would or wouldn't in that case.

Q. Well, I know; and you never did get anything for it, did you? A. No.

Q. As a primary service man you made out your own time cards, didn't you? A. Yes; we made out our own time sheets. They were carried for a half a month each.

Q. You didn't make a daily time card? A. We posted our time on a time sheet for a half a month at a time, and then balanced it up and turned it in.

Q. At the time you started permanently as a trouble man, or primary service man, you would show any overtime for any services you performed after eight hours on that time sheet, wouldn't you? A. That was put on a separate time sheet. We had an overtime sheet and a regular time sheet. The overtime was on a separate sheet for the half-month.

Q. Well, on your overtime sheet you put on all the actual services that you performed after eight hours? A. That is right; yes.

Q. And you got paid for all of them? A. We got paid for all that was on that sheet, yes, all that I did.

Q. Did you ever make any claim for overtime that wasn't paid you? A. I don't believe I did, no, sir.

[Pp. 25/26, lines 15/1]:

Q. How did you compute your overtime; your hourly rate? Were you given a figure? Did anybody give you a figure for that? A. The E. D. S. office. I believe they got their instructions from uptown. We have three or four methods of computing time. We have, naturally,

a flat \$225 monthly salary which covers our regular shifts. Then that is computed against work orders, and so on, at a variable hourly rate which, of course, doesn't affect my salary of \$225, and I don't suppose it has any bearing on the case—I am just mentioning it in passing—but what does have a bearing is that we have an overtime rate of \$1.95 an hour for time and a half, and then we have a holiday rate which is \$1.2980.

[Pp. 27/28, lines 19/7]:

Q. Five days a week, yes, if one of those days falls on a company holiday and you work it, you get this extra compensation for the hours you work? A. Yes, sir.

Q. At this rate of approximately \$1.30 an hour? A. If I work a holiday in addition to my \$225 I get approximately \$10.40 additional pay.

Q. That would be for an 8-hour day? A. Yes, sir.

Q. Have you ever worked less than eight hours on a holiday? A. Well, if I did, it was allowed as an 8-hour holiday.

Q. It was? A. Yes, sir.

[Pp. 39/40, lines 2/3]:

Q. Now, you spoke about having one hour standby time in the morning from 6:00 a. m. to 7:00 a. m. Actually, of course, it wasn't quite an hour, was it? You spent part of that time going to your garage or to the station? A. That is right, yes.

Q. Also, as I understood you to say, they explained it on the theory that they thought, in order to be at the station by 7:00, you would be up by 6:00 and getting you breakfast, and it would be more convenient to have you called than to wake the other man up. That was the reason they gave? A. That was the reason they gave me for changing that, yes.

Q. I suppose, as a matter of fact, they were correct, that in order to be there at 7:00 you had to be up by 6:00? A. I was generally up by 6:00 anyway before that order came out.

Q. And you would go on about as you naturally did unless you got a trouble call during that hour before you left the house? A. That is right.

Q. If you got a trouble call and responded to that before going to the station— A. Yes; even before I ate my breakfast, if necessary, and it usually was.

Q. Well, did you put in overtime for that? A. Yes, sir. During that hour we got overtime if we were called out.

[Pp. 41/42, lines 21/1]:

Q. Do you know whether or not they had these bulletins filed in a bulletin book? I am talking about at the station. A. The E. D. S. office had a bulletin on the hourly rates that I explained to you. The clerk showed that to me to show me what my hourly and overtime rate and holiday rate was; but it was never posted on the bulletin board that I know of.

[P. 45, lines 16-19]:

Q. But still you don't get paid for any of that standby time, except the time you actually leave your home to go out on duty? A. That is right; just what I am called out on.

[Pp. 47/48, lines 19/11]:

By Mr. Sterry:

Q. Mr. Borden, when your daylight active shift was up and you went home, you could do as you pleased so long as you or your wife remained where a telephone call would reach you. Isn't that correct? A. You mean on the nights when I didn't have standby or when I did?

Q. When you had standby you went home, ate your dinner, conversed with your family and did anything you wanted to that didn't take you away from your house?

A. Yes; I did as I pleased unless I was called out. I could sit there and listen to the radio as long as it didn't interfere with the telephone calls. As long as I was within hearing distance of the telephone I could do as I pleased.

Q. Or if you stepped out at all, as long as a member of the family was there and could hear the telephone and call you? A. Yes. If I went out to the garage the wife took the calls and called me in so I could answer them.

W. H. CULBERTSON.

[P. 5, lines 1-12]:

Q. What were your hours of work? A. From 8:00 to 5:00 with an hour at noon.

Q. You mean 8:00 in the morning? A. Until 5:00 in the evening.

Q. And you had an hour off for lunch? A. An hour off for lunch.

Q. Where did you live? A. I lived on Santa Paula —Santa Barbara Street.

Q. The company didn't furnish any residence? A. No.

Q. You had your own? A. I had my own home.

[Pp. 8/9, lines 9/2]:

Q. What about your quitting time? You were supposed to quit at 5:00 at night? A. We were supposed to quit at 5:00 o'clock at night.

Q. Where; at the garage? A. At the garage.

Q. Suppose you were out on the job far enough away so that you got through with your work at 5:00 and it

took you a half hour to get back to the garage? A. We got overtime for everything after 5:00 o'clock, or any trouble call we got at night.

Q. Let's not come to that right now. What I am talking about is this: If your work was through, you had actually done all the repairing at 5:00 but you are out on the line so you were delayed getting back into the garage, you got overtime for that? A. We got overtime.

Q. And you say you got overtime if you were called out at night? A. Yes.

[P. 9, lines 16-20]:

Q. You don't mean by that you got a call every night? A. No.

Q. But that some nights you would get two or three and then there would be a time when you wouldn't get any? A. That is right.

[Pp. 11/12, lines 20/16]:

Q. What do you mean by being on 24-hour call? A. Well, I had to stay at home by the phone. I had to be where they could reach me at any time by telephone.

Q. Weren't you simply instructed that if you left your home that you were to leave your number where they could get you? A. Well, who would answer the phone if I was gone?

Q. Well, answer my question: Weren't you allowed to leave your house if you left your telephone number? A. Well, they would have to know where I was at.

Q. Well, all right. Did you have any way of letting them know where you were? A. I would call the Saticoy sub or the Fillmore sub. That is where we get our calls from when we weren't down at the garage.

Q. What instructions did you have about either staying at home or leaving telephone calls where you could be

reached? A. You were always supposed to be reached by the telephone or they knew where you were at all the time.

Q. Did you have any written instructions on it, or were you simply given that instruction by some superior?

A. The superintendent.

[Pp. 12/13, lines 25/8]:

Q. Now, tell me in substance what he told you about either not leaving your home or leaving a telephone number when you did leave your home? A. Well, it was the job. That was the job.

Q. Well, that may be more or less a conclusion that the court will have to decide. What I am asking you is what he said to you. I don't mean the exact words, but what did he tell you? A. He wanted to know where I was all the time. That is the one thing. I had to be by the phone.

[P. 13, lines 17-18]:

A. He always told us to always call Saticoy when we were going out on a call.

[Pp. 14/15, lines 25/7]:

Q. Well, what he told you was that you always had to be where there was a phone, whether you were in your house or some place else? A. Where they could get in touch with us.

Q. And if you went out of your own house, to leave word where they could reach you? A. All the time.

Q. I say is that the substance of what he told you? A. Yes.

[P. 22, lines 1-4]:

Q. As I understand it, after 5:00 in the evening and before 8:00 in the morning you had nothing to do for the

company except answer a call when you were called?

A. Whenever we were called on trouble, that is all.

[Pp. 22/23, lines 14/3]:

Q. How did you get your overtime? You spoke about your regular hours and overtime for everything beyond your regular hours. How did you get your overtime?

A. Oh, we knew the hours that we worked.

Q. I know that; but I mean how do you make any record of it? A. We have a daily time sheet and put our time down every day.

Q. And on that daily time sheet you have—A. A place for overtime.

Q. —a place for your overtime and a place for your normal time? A. Yes.

Q. And that is supposed to show the number of hours you work every day? A. Yes, sir.

[Pp. 23/24, lines 24/7]:

Q. You always signed your own? A. I always signed my own time sheet.

Q. You never put down any overtime that you didn't get paid for, did you? A. No, sir.

Q. And insofar as you knew, you put down all of the overtime you did perform, didn't you? A. I tried to.

Q. At any rate you didn't intend to overlook any? A. No.

[Pp. 28/29, lines 22/6]:

Q. Either as a lineman or as primary service man, you computed your overtime from the time you left your house, did you not? A. Yes.

Q. In other words, if at 9:00 o'clock at night you have a call, you would get up and start out for it, and if it was 12:00 before you got back home, you would charge the full time from the time you left your house until you

returned to your house? A. We charge the full time from the time we left the house until we returned. That's the way I did it.

[P. 33, lines 10-14]:

Q. You either had to be home or if you went someplace you would have to be where they could get you on the public telephone and you had to tell your superintendent or Saticoy. Is that correct? A. That is right.

[Pp. 39/40, lines 26/9]:

Q. At any rate, you could live wherever you wanted to? A. Yes.

Q. It was not a company-owned house? A. No.

Q. You are a married man? A. Yes.

Q. With a family? A. Yes.

Q. You live there with your family? A. Yes.

[P. 43, lines 17-26]:

Q. You only put in for the actual time that you worked. Is that right? A. Yes.

Q. When you left your home and went out on an emergency? A. Yes; that is the only time.

Q. Why did you only put in for that time? A. That is what they told us to do.

Q. Who told you to do that? A. The superintendent.

[Pp. 44/45, lines 14/11]:

Q. To your best recollection did he tell you that you would or would not be paid while standing by to answer these emergency calls? A. Well, I don't know. Just in those words he didn't tell me.

Q. What was the substance of it? A. Well, it was just assumed that if we worked, we got paid for it; and if we didn't, we just stayed home by the telephone and waited for trouble.

Q. You are distinguishing then between the actual time you left your premises to go out to answer the call and the other time you didn't put in for? A. You didn't put in for that, no.

Q. Now, when you did go out to answer an emergency call how did you get paid? Did you get paid time and one-half? A. Time and one-half.

Q. Time and one-half your hourly rate? A. Yes.

Q. You had a regular hourly rate, did you? A. Yes.

Q. While employed as a primary service man? A. An hourly rate, yes; you have a regular hourly rate.

[P. 48, lines 11-16]:

Q. But you only got paid for the time you spent there in actual work, and didn't get paid waiting to answer that call? A. No.

Q. You did not? A. I did not get paid.

[P. 54, lines 11-21]:

Q. You always considered your salary as full payment for everything you did except this actual work you did out of hours for which you got overtime? A. Yes.

Q. Now, what was your salary as a primary service man; do you remember? A. \$220.

Q. Was it at that figure constantly all the time or was it raised? A. Well, it has been raised a little. It was \$185 and then \$190. You know, it was just raised along there.

A. L. HONNELL.

[Pp. 5/7, lines 24/23]:

Q. What are your working shifts now? A. My working shift now is from 8:00 o'clock in the morning until 5:00; and then the 16 hours standby. I go to work Tuesday at 1:00 o'clock and I work until the following Tuesday at 1:00 o'clock; that is, eight hours on the job and 16 hours standby, and then an additional five days up until Saturday. Then I have Sunday and Monday off.

Q. You have six days a week? A. We are working six days a week and I get time and one-half for the sixth day.

Q. Up until the government through whatever board it was that decreed the 48-hour week in Southern California, you only worked five days? A. Five days is all we worked. I don't know just when the company started on 48 hours.

Q. That is a matter of record, but I think we can all agree that you were required to work the sixth day when the government decreed this as a critical labor shortage area and put it on a 48-hour week. A. Otherwise we worked five days a week before that, or 10 days.

Q. Ten days? A. Well, we worked a 10-day shift; 10 on and four off.

Q. You split your weeks? A. That is right. Seven days on 24-hour call and three days, eight hours each.

Q. Let's confine ourselves to your regular eight-hour shift for a while. How long have you had the hours that you have had of 8:00 to 5:00? A. Oh, I don't know just the exact number of years, but it has been the last five or six years.

Q. That is long enough for me. There hasn't been any recent change like the other gentleman had? For the last four or five years you worked from 8:00 in the morning until 5:00 in the evening? A. That is right.

Q. Did you have a half hour or an hour off for lunch?
A. One hour.

Q. And you could take that whenever you wanted to with the limitations, of course, of work permitting? A. Yes. My regular lunch hour is from 12:00 to 1:00, but, it's just like you say, there are some days that I don't get it from 12:00 to 1:00 but I can go eat when I get clear.

Q. What I mean is: Did the company specify 12:00 to 1:00 for lunch? A. No.

Q. In other words, if you wanted to, you could take 1:00 to 2:00 or 11:30 to 12:30? A. Yes.

Q. Of course, whatever time you took might have to be changed if you got a trouble call? A. That is right.

[Pp. 9/10, lines 19/23]:

Q. Now, on this time that you refer to after 5:00 o'clock when you go home, what has been your instructions as to what you are to do then insofar as getting calls are concerned or answering trouble calls? A. When I go home I stay there and do whatever I want to around the place. I do my yard work, anything I have to do after 5:00 o'clock; and if I get a call, I take care of whatever it is. The substation calls me, and when I get through with the call I go home. I don't call him back because I have a two-way radio system in my car, and if they want me again they will call me back on the air; and if they don't have anything for me and can't get me on the air, they can always catch me at home.

Q. Well, have you had any instructions as to whether you should stay at home or if you went some place else leave your telephone number? A. Yes. If I want to go to Joe's house, providing he has a telephone, I in turn call the substation and notify them where I will be so in case they want to get hold of me they can.

Q. When you referred to Joe, you meant any one of your friends? A. That is right.

Q. That has been the custom for the last four or five years? A. Yes.

Q. Have you ever felt at liberty during that time on the days that you were receiving these calls, to go to a motion picture if they had a telephone in the picture house? A. I went to one or two but got called out so I gave that up.

[Pp. 18/19, lines 18/6]:

Q. How about your time cards; do you turn them in daily, monthly, semi-monthly or weekly or what? A. I have a 15-day period on my time sheets.

Q. What is your salary? A. \$225.

Q. \$225? A. Yes.

Q. Has it been that for the last three years? A. Yes, sir.

Q. You never received anything except that salary and the overtime that you put in? A. That's right.

Q. Have you ever put in any overtime that has been disallowed? A. No.

[P. 19, lines 11-20]:

A. We keep our own time, and every morning, if you have any overtime, it is taken to the superintendent and okayed by him.

Q. Did you ever have any time that he refused to okay? A. No, sir.

Q. He does that, I presume, just as a matter of form, doesn't he? That is, does he ever ask about it or does he just okay it? A. He knows what the trouble was and things like that and signs it. He never has questioned it.

[P. 22, lines 10-12]:

Q. You have been paid fully according to the time sheets that you have turned in? A. Yes, sir.

[P. 24/25, lines 25/22]:

Recross-Examination.

Q. By Mr. Sokol: I would like to ask you this question: Why haven't you put in this so-called standby time on your overtime sheet? Why haven't you asked for overtime on that? A. You mean standby after 5:00 o'clock?

Q. Yes. A. Well, I didn't think there was any use. I didn't think anybody got it.

Q. Well, were you told that you would receive compensation for that standby time? A. No; I wasn't told that I would receive any compensation.

Q. Were you told that you would only get paid for the times you left your home on duty? A. The only time that we would get paid for is the time that we left our home to go on call and take care of whatever emergency trouble arose.

Q. Who told you that? A. That was the superintendent's orders.

Q. In other words, did he or did he not tell you that you wouldn't get paid for the other time, the standby time? A. Oh, no, they wouldn't pay it at all unless we had a call.

JOHN M. SMITH.

[Pp. 7/8, lines 24/9]:

A. [*sic*] That's what I mean. Of course, your work may change it, but what I mean is, the hours are simply fixed from 8:00 to 5:00 with one hour off that you can take either as you please or as your work requires. Is that correct? A. Well, I suppose it would be. I was never told that.

Q. Were you told anything differently? I mean were you ever specified any particular time? A. They specified the hour off at noon.

Q. Well, I know, but "one hour off at noon" you could construe generally to mean from 12:00 to 1:00. A. Yes; that is from 12:00 to 1:00 at noon.

[Pp. 9/10, lines 20/16]:

Q. What was said, if anything, if you left your house, about leaving your telephone number? A. He told me if I got a trouble call and left the house to call Saticoy and Filmore and tell them where I was going and about as near as the length of time I would be gone, and I would call them as soon as I found the trouble and report it back.

Q. Well, that I don't think quite answers my question. Did he say anything about the fact that, for instance, if you went out to see some friends after 5:00 o'clock that you could leave your telephone number where you were? A. No. I guess he figured I never would go out, so he never told me.

Q. Did you ever go out? A. Not that way, no. They have tried to get me over the telephone a time or two and he would jump me the next day and say, "We tried to get you over the telephone," and I asked him

what time and he told me, and I told him he could check with Saticoy and he'd find that I'd been out on some trouble. When that happened, I figured it wouldn't do for me to go to the show or somewhere and let him catch me out that way, because he would catch me the next morning, "Why didn't you answer the phone?"

[P. 14, lines 4-9]:

Q. At all times while you were a primary service man you were receiving a salary of \$225, as I understand it. A. Yes.

Q. Then you were paid time and one-half for anything you actually did after your regular hours? A. Yes; when we were called out to work.

[Pp. 14/15, lines 24/16]:

Now, to save Mr. Sokol a question—I don't know that I will—you didn't get any overtime except for actual service that you performed. Is that right? A. All the overtime I ever got was if I was called out. The time I was gone, why, I got overtime for.

Q. As a primary service man you made out your own time cards? A. Yes; I made out my own time sheets.

Q. You put in for all your overtime as you figured it? That is, you figured it, didn't you? A. Yes.

Q. And you were paid for all of it? A. I was paid for all of it. I never turned in any that I didn't get paid for.

Q. In other words, nobody ever questioned what you turned in for overtime? A. No, sir. I would make out my time sheet, make out my overtime, and take it in and get Mr. Schlinger, the superintendent, to sign it.

[Pp. 19/21, lines 2/12]:

Q. Did anyone tell you that you had to be available there to answer that phone? A. Sure.

Q. Who told you that? A. Schlinger told me that. That is what I was saying a while ago.

Q. If that was the case why didn't you put in for the time that you were waiting at home to answer those calls? A. Well, I didn't figure there was any use. Nobody else ever done it.

Q. Were you told at any time that you would not be compensated for the time that you were standing by waiting to answer those emergency calls? A. Well, I don't know as though I was told that when I took the job, but then everybody else had been doing the same way and, of course, I knew.

Q. You mean that is the custom and practice in the company? A. That is the way they had been doing for years, at least ever since I've been there.

Q. Not to pay for that time? A. Yes.

Q. But you have been getting time and one-half for the time that you actually used in actual work on an emergency call? A. Yes.

Q. And that time and one-half has been based on what? Do you know how that is figured out? A. Yes.

Q. How you figure the average annual hourly rate? A. My overtime rate at \$225 was \$1.95 an hour.

Q. As I understand it then—

Mr. Sterry: I think, Sokol—I may be wrong because I haven't had time to examine them all—but I think they took the monthly rate and multiplied it by 12 and then divided by 52 times 40.

Mr. Sokol: Yes.

Q. But you did have an overtime rate of \$1.95 an hour? A. Yes; and then I would figure out my time.

I would have to figure every hour. I couldn't make my time sheet out for two and a quarter a month; I had to figure every hour. If it was two hours, it would be twice \$1.95.

Q. For the overtime? A. For the overtime.

Mr. Sterry: I don't mean to interrupt, but when you say \$1.95 an hour do you mean that that was your hourly rate or that is what the overtime amounted to?

A. I've got a book. I mean I get the schedule out of the book that is in the superintendent's office.

Q. By Mr. Sokol: The hourly rate for overtime you mean? A. Yes. \$1.95 is overtime, and our other rate varies, our regular time varies. It is not the same every month, but we have to figure it by whatever that rate is. I mean we've got to get that out of the book in the superintendent's office and figure for that rate.

Mr. Sterry: May I ask—I don't mean to interrupt, but I want to get it clear—was the \$1.95 what you were paid for overtime?

The Witness: Yes, for overtime. You see, we had two time sheets. My overtime was on one time sheet and my regular time on another one.

[Pp. 22/23, lines 22/6]:

Q. As I understand it then there would be some times when you would be standing by in your home waiting for a call and actually would not be required to go out and perform work outside of your home on your standby time. That would happen? A. Oh, yes, that would happen.

Q. And so you never got any money for waiting?

A. No.

Q. You never got any money for waiting around like that? A. Oh, no.

(2) SUBSTATION ATTENDANTS.

H. L. ANDERSON.

[Pp. 3/5, lines 18/1]:

Q. When you were hired by Mr. Short as an apprentice, what did he tell you about the job? A. He told me that the job would necessitate my staying on the property 24 hours a day; in relieving men in one-man substations it would be necessary to drive to a substation and arrive there at 8:00 o'clock in the morning, and remain there until 8:00 o'clock on the morning that my relief was finished; that the job would ultimately lead into one-man substation operator, or station attendant, as they were called; that I would live on the property, then, and have a cottage on the property, and be required to stay on the premises 24 hours a day until my scheduled day off, when the relief man would come in and relieve me and take over for that 24-hour period.

Q. Did he tell you anything about the duties on the job as a substation attendant? A. Yes. He told me that the duties entailed keeping up the grounds and equipment, trip testing, routine switching operations, and emergency switching operations.

Q. Did he tell you anything else about the job that you can recall? A. That is about all.

Q. Was anything said about salary? A. Yes.

Q. For substation attendant? A. Yes.

Q. What was said about that? A. He said that the starting salary would be \$120.00 per month.

Q. What was that to cover? A. Well, that was my wages for the job.

Q. The whole job? A. Uh huh.

Q. Did you say "Yes?" I mean he can't get the nod of your head on the record. A. Excuse me.

[P. 6, lines 6-25]:

Q. Were the duties substantially as they had been represented to you? A. That is right.

Q. What stations did you operate as a relief operator? A. Colonia and Fillmore.

Q. After going to Casitas, you were there until you moved to Big Creek? A. That is right.

Q. Now, you stated that the work became boring. What did you mean by that? A. The necessity of having to stand by and wait for cases of trouble and operations for periods other than my regular working period. Previously, I had been used to working an 8-hour day, and at the finish of that 8-hour day, I was free to do as I pleased. In this job it was necessary to remain within call, or, in fact, on the Company premises so that I could be there to answer any alarms, or telephone calls. Many times I wanted to go into town, go to a show, or visit the neighbors, and I was prevented from doing so by the necessity of having to be right there at all times.

[Pp. 8/11, lines 22/14]:

Q. What do you include in the term "active work?" A. Switching and working on the equipment, upkeep of the equipment, cleaning and maintaining the station in its proper form, maintaining the grounds, hoeing weeds, mowing the lawn, watering the lawn, taking routine meter readings, reporting to the switching center three times a day, and any switching that was being done by the district or by Transmission that necessitated my operating the equipment.

Q. Do I understand that it is your estimate that on an average you spent eight hours a day in active work of that kind? A. That is right.

Q. That does not include your studying, or things of that kind? A. No.

Q. At the time you conversed with Mr. Short about the job, or talked with the Division Superintendent, was any estimate made at that time as to how much of your time at the station daily would be spent in active working time? A. No.

Q. Now, during this time that you were working as a substation operator, were you paid overtime for any work? A. I was.

Q. What work were you paid overtime for? A. For the sixth day in the week; and I believe on several other occasions at which time I had to operate the substation after 5:00 o'clock at night for long periods of storm, and so forth.

Q. On any other occasions? A. I don't believe so.

Q. How were you paid for the rest of the time? A. I was paid a monthly wage, which was based on an hourly rate. That hourly rate was derived from the number of working days in the month, and that was computed in a 40-hour work week.

Q. At the time you discussed this work with Mr. Short, who hired you, was the salary quoted to you on a monthly rate? A. A monthly rate.

Q. Did you make regular time reports on this job? A. I did.

Q. How often were they made? A. We made a daily time sheet for a while. I mean it was just shortly before I left that the system was changed to a weekly time sheet, but the greater part of the time we had a daily time sheet that was made, and we posted that to a monthly time sheet ourselves at the end of the month. Those were turned into the division office at the end of each month, both the daily and monthly time sheets.

Q. When you went to a weekly time sheet, did you post that daily or weekly? A. That was posted daily. The only difference was that it had sufficient space on it to take in all of the days of the week.

Q. On these overtime hours that you mentioned when you were paid overtime after 5:00 o'clock, was there a space on these forms to show that? A. Yes.

Q. By whom were those forms approved? Where did they go after you signed them? A. To the Division Superintendent or his clerk.

Q. Those were made on Company forms? A. That is right.

Q. Did you keep any other time reports, or make any other time reports while you were working as a sub-station operator? A. I did not.

Q. Who instructed you as to how to make out those reports? A. The Division Clerk.

Q. Who was he? A. Henry Lamb.

[Pp. 11/12, lines 23/17]:

Q. Will you tell us just what your instructions were on the first occasion? A. Well, I believe I was given a copy of a time sheet that had been filled out and posted in the operating instruction book. That copy was explained to me, the different lines on the copy, the days, marking "X's" for the days off, and so on and so forth, using the proper symbols and bringing it to the proper time. I was shown how to compute my hourly rate by taking my monthly time and dividing it and breaking it down into an hourly rate for that particular month per number of work days.

Q. What instructions were you given as to the filling in of the overtime section? A. On the overtime section we were told that any overtime that occurred, we were to

put it down in that section; that we were to charge an overtime rate, based on our average annual salary.

Q. What were your instructions as to on what occasions you were to classify your time? A. Our overtime was classified as the sixth day in the week; that is, over 40 hours in the week.

[Pp. 13/14, lines 21/1]:

Q. Where did you live while working at Casitas as a substation attendant? A. I lived right on the property.

Q. Was the house right on the substation property? A. Yes.

Q. How far from the station? A. I should say about four or five hundred feet.

[P. 14, lines 7-17]:

Q. Was the house furnished? A. No.

Q. You put your own furniture in there? A. Yes.

Q. Did you live there with your family? A. Yes.

Q. Do you have any children? A. Yes.

Q. How many? A. Two at the time I moved there, and one was born while I was there.

[Pp. 15/16, lines 21/17]:

Q. Were there any occasions during the daytime when you would be in the house, itself? A. Yes, I have gone in the house.

Q. Now, at the present time how do you spend your evenings? A. Oh, various ways.

Q. What do you mean? A. We go to a show occasionally.

Q. About how often will you go to a show? A. Possibly once a week; or visiting our friends, playing pinocle. That is one of our main hobbies. One evening a week I attended school, night school.

Q. What were you studying? A. Turbine design and operation.

Q. Did you take any electrical courses, either by correspondence, or otherwise, while you were there at Casitas?

A. Yes, I did.

Q. What school? A. American School of Electrical Engineering.

Q. About how much time did you spend on that? A. Oh, I was supposed to devote an hour a day to that. I am sorry to say that I didn't keep up quite that well with it, though.

[P. 18, lines 4-12]:

A. I confined my daytime reading to the reading of my instructions, reading blueprints, and so forth, at the station. I might say that I was trained by a man, or broken in on that station by a man who had quite a deep feeling of responsibility to the job. He left the station in fairly good order for me, and he more or less instilled a certain pride in keeping the place up; and in training myself in that job I tried to follow his methods, his schedules of work, as near as it was possible.

[P. 23, lines 5-8]:

Q. And each time one of those operations occurred, you entered it in the record? A. That is right. We also kept a daily log of each and every operation.

[Pp. 23/24, lines 16/2]:

Q. In the course of a normal day without trouble, however, you were not required, during any particular time of the day, to remain in the station? A. Well, at 8:00 o'clock in the morning, 12:00 o'clock noon, and 5:00 o'clock at night I was to be at the station; that is, in the station itself, to take meter readings and report them into the switching center.

Q. And on each occasion that took about how long?

A. Oh, 15 minutes in the morning, about the same at noon, and it took about a half hour at night; because the total energy consumed by the station, or passed through the station, had to be computed and turned in in a report at night.

[Pp. 26/27, lines 16/13]:

Q. How much time do you believe should be considered overtime on that job, the job that you had? A. I should say about six hours a day.

Q. How do you arrive at that figure? A. Well, I conscientiously put in eight hours a day at the station and on the grounds doing the work of the Company. I slept eight hours of the day. I would say that I took about two hours for meals, a half hour for breakfast, a half hour for lunch, and an hour for dinner at night. The remainder of the time was really not my own. I was under orders during that other six hours. In fact, I was under orders during my sleeping time; but I did sleep. I averaged eight hours a day sleeping, although there were times when I would have to answer the alarm bell at 3:00 o'clock in the morning, waking out of a sound sleep, diving for my clothes and making a dash into the station, check my trouble, analyze the work, go through my operation, and return back to my bed possibly a half hour or hour later, and be unable to sleep from then until daylight, because it just riles a person up. Your nerves are pretty well on edge on a job of that sort, at least mine were; but I do say that I did, on the average, get eight hours of sleep a night. The remainder of that time, which would be six hours, why, I spent waiting for trouble to occur.

[P. 28, lines 12-24]:

Q. Did you normally spend your evenings with your family while you were at the substation? A. Did I?

Q. Yes. A. Yes.

Q. During what periods did you read fiction and other light reading that you mentioned? A. In the evening.

Q. The early evening? A. I beg your pardon?

Q. Generally between what hours? A. Oh, between 6:00 o'clock and 10:00, 11:00 o'clock at night.

[P. 29, lines 3-8]:

Q. Did you have any other hobbies than those you have already referred to in connection with other questions? A. No. I was particularly interested in training myself to be an operator. I spent a great deal of time at that, trying to improve myself to better my chances for a higher job.

[P. 29, lines 19-20]:

Cross-Examination

By Mr. Sokol:

[Pp. 31/33, lines 24/18]:

Q. Well, now, you stated when you went to work, Mr. Short talked to you and told you about your monthly rate. However, after you went to work did you receive any written instructions with respect to whether or not you would be on a 40-hour week? A. Yes, I did.

Q. What were those instructions? A. The written instructions concerned our posting our time to our monthly time sheets on the basis of a 40-hour week. It was necessary for us to state at what time our work began and ended. Also that we were paid at so much per hour for 40 hours, and at so much per hour for the following eight hours on the overtime day, giving a total. That had to

be posted for each week in the month on the monthly time sheets.

Q. With respect to the overtime that you did put on the time sheets after getting approval, was that time and one-half after 40 hours? A. That is right.

Q. Time and one-half the hourly rate? A. Time and one-half the average annual hourly rate.

Q. Based upon eight hours a day? A. Based upon eight hours a day.

Q. Now, when the Government put us on the 48-hour week, you worked the sixth day, then? A. That is right.

Q. Previous to that you were working how many days? A. Five days.

Q. In other words, on the time sheet you showed five 8-hour days? A. That is right.

Q. Then when you went on the 48-hour week, you put down six 8-hour days? A. That is right.

Q. Did you ever put down this stand-by time when you were waiting to do your work? A. No, I did not.

Q. Why not? A. It wouldn't have been allowed to go through.

Q. Why do you say that? A. The precedent I don't know. That's all I can state.

Q. You were following written instructions that you were to be on duty for 24 hours a day, but that you were only to have a working day of 40 hours. Do you recall that specific instruction? A. Yes.

Q. You mean a working week? A. Yes.

[P. 34, lines 1-12]:

Mr. Woodbury: In this connection, Mr. Sokol, may I ask you to designate what you are referring to as stand-by time?

Q. By Mr. Sokol: You tell us what you consider stand-by time. A. I consider as stand-by time, any time after my dinner hour until going to bed, although we were required to get up during the night if an alarm rang. We were still on stand-by when we were asleep. The fact that we went to bed did not relieve us of the responsibility of being on stand-by. So, actually, your stand-by time was from 5:00 o'clock at night until 8:00 o'clock the next morning, and also during the lunch hour.

[P. 37, lines 1-10]:

Q. After 5:00 p. m. did the telephones ring? A. Yes.

Q. With any regularity? A. No.

Q. Well, within what space of time would they ring?

A. Well, they varied greatly.

Q. Did you get calls every night? A. No.

Q. Not every night? A. No.

EUGENE L. ELLINGFORD.

[P. 3, lines 8-10]:

Q. When you became a substation operator, who hired you for that job? A. Mr. L. L. Dyer.

[Pp. 3/5, lines 23/24]:

Q. Which one of those men told you about the work of being a substation operator? A. Mr. Garrison, Mr. L. L. Dyer, Mr. W. L. Dyer and Mr. H. L. Steck.

Q. They all told you the same story? A. That is correct.

Q. What did they tell you about the job, the nature of the job? A. They told me that I would be subject to anything that might be required; that I would be required to put in 24 hours a day; and that not to become discouraged because it was their policy to move the men up as they got the opportunity.

Q. By "moving them up" you mean from relief to substation attendant? A. To substation attendant, and from substation attendant to assistant operator or second operator at a major substation, and then on up.

Q. What did they tell you about the duties of the job; what work you would have to do on the job? A. Well, just routine and emergency operating, and keeping the place looking decent, the grass cut, the weeds cut down, and so forth. The Edison houses were on Company property, and we had to see that the weeds were cut down around the house, and so forth.

Q. Had you been a substation operator before coming with the Company? A. No.

Q. Did they tell you anything else about the mechanical active duties of the job that you were to do? A. Well, I can't seem to recall so very much, except that they told me that there was the taking care of Edison property, and that I was to be available in case any trouble came up at any time.

Q. Did they make any estimate or tell you anything about how much time during the day you would have to spend in these active duties? A. I believe they said it was customary to generally work about eight hours, and the rest of the time we stood by.

Q. Did they tell you that you would work actively for eight hours? A. No. In this one respect they said that they would prefer that we—well, let's see how they worded that. As near as I can recall, they worded it to the effect that they would like to have us in and about the station and vicinity, close-by, during the daytime in case some one should call. That is as near as I can recall at this time.

Q. What did they tell you, if anything, about how much time the job would require in lawn work? A. They made no mention of how much time that would require. In other words, in some respects, Mr. Steck, I believe, told me that some of the fellows used to get up at 5:00 o'clock in the morning and have all the work done by eight o'clock, and from then on his time was his own.

[Pp. 6/8, lines 24/26]:

A. They told me that I would start at \$100.00 a month, and out of that \$100.00 a month I would be required to pay the regular station attendant a cent and a half per kilowatt while I was on relief, and that I would be required to maintain my family outside of Company property.

Q. That was when you were hired as a relief operator? A. That is right.

Q. What did they tell you about the salary as a one-man substation attendant? A. They told me the salary of a one-man substation attendant would be—Mr. Garrison implied that after I had been with the Company a few months I would receive a raise in pay, and that I could look for a periodic raise until I got up to a certain amount.

Q. What amount was that? A. The prevailing wage for substation attendant, or substation operator, as they were known then.

Q. Was that to cover the whole job? Is that your understanding? A. The figure was given to me—in other words, I don't recall whether it was to cover the whole job or not, but I understood it was to cover the 8-hour

period, which was normally being shown on the pay roll at that particular time.

Q. Was it your understanding that you were to be paid anything in addition for this time that was not reflected in the eight hours? A. I received no pay for it. I will say that much.

Q. Was that your understanding at the time you took the job? A. I don't recall about that, but I know the only time I ever got paid when we were sitting around waiting for the alarm bell to ring was when it rang and the trouble was sufficient enough to warrant it.

Q. Do you recall what, if anything, was said about any overtime at the time you were hired, as to when you would get it, if at all? A. I didn't ask about overtime conditions. I left that up to the Company, because I was told they were a fair company to work for.

Q. Was your work at Los Alamitos and Anita, where you were a one-man substation attendant substantially the same kind of work at both places? A. Yes.

Q. Can you tell us just about what you do; and, if you can approximate it, about how much time each day is spent in your various duties? A. I couldn't approximate that, for this one particular reason, that now, like today, for instance, you gentlemen all come out here and I come over to work at about 7:00 o'clock in the morning to get out some of my paper work. I have been here ever since 7:00 o'clock—oh, maybe, two or three minutes after 7:00—doing various little things, cleaning up the sta-

tion, cutting a few weeds, and twiddling my thumbs for a while waiting for you fellows to come.

[Pp. 9/11, lines 10/26] :

Q. It varies, I take it, from day to day as to how much time you put in in active work. Is that right? A. We have to take readings from 8:00 o'clock to 12:00, and from 2:00 o'clock to 6:00 o'clock.

Q. Those are hourly readings? A. Yes, sir.

Q. How long do they take? A. About five minutes.

Q. On each hour? A. But in between times, why, we check transformers to see whether they are hot, check the temperatures.

Q. How long does that take you? A. Well, let's go out and do it.

Q. I mean you've done it. About how long does it take you to check them? A. Oh, about 10 minutes to check the motors and transformers, and so forth.

Q. How many times do you check them in a day? A. Every time I go by them. Sometimes we go by them every 15 minutes. I always stick out my hand and touch them to see if they are hot.

Q. How often do you make a record of those temperatures? A. We record that on the OD-98 whenever we take a reading.

Q. So on the hour you spend, if I understand your testimony, around five or 10 minutes taking a reading on your meters, and, maybe, five minutes in addition check-

ing your transformers? A. Then we rule up the log book in the morning, and that takes time. We have to check into the switching center; and, anything we want to know, we have to call in during the day. We spend periodic time studying over our emergency operating orders and our station instructions.

Q. Do you do that every day? A. Well, we have to, because there are always changes coming on. Mr. Moran will tell you that.

Q. About how much time during the day do you spend on that on the average? A. Well, it just depends on what else comes up. Now, like today, we may not get much of a chance to do that; but, maybe tomorrow, we might spend more time doing it.

Q. Let me ask you this: about how much time would you estimate that you spend during the day in what we will term active work duties; that is, where you are really doing some actual physical work? A. Well, we put in our time from 8:00 to 12:00 and from 2:00 to 6:00, and other time as required. If the electricians are here, we start in at 7:30 in the morning, and keep going on through until the electricians leave. After they leave we have to clean up. So, again, I say the physical labor varies. You see, we have to do all our own physical work and all our own paper work; and, in addition to that, be somewhat of a diplomat. People call us, and if they happen to have a blown fuse, it's nothing to spend 15 minutes trying to get the customer's service back to him when we

can't send a trouble man out. We try to pacify the customers, and keep up the satisfactory standards of Edison service.

Q. I appreciate that, Mr. Eillingford, [sic] but what I am trying to get at is some idea of an average day. If you can't, you say so. A. You can't call them an average day, my friend, because every day brings something different. We don't know how many times the trouble men are going to call out here and say, "Have you got anything for us?" or the Transmission men. Generally, when they are here, it has been Company policy for us to keep an eye on them to see that they don't do something they're not supposed to do. So, like I say, I wouldn't say what is average; but I do say we take our readings from 8:00 to 12:00 and 2:00 to 6:00.

[Pp. 12/15, lines 20/1]:

Q. Were you paid while you were at Los Alamitos and Anita, were you paid overtime for any work of any kind? A. Emergency operating only.

Q. What was your understanding as to what constituted emergency operating work for which you were to be paid overtime? A. The only way we got it was because we had to fight for it. The test case of it was when the Rancho 11 kv line relayed to Los Alamitos, and I had to get up out of bed and close the Rancho 11 kv line for test, and it relayed again; and upon doing that I called Santa Fe Springs and State Street Switching Center, and stated what happened. Santa Fe Springs happened to be

the switching center that handled the switching, and they told me to remain in the station; and I remained in the station, and I think I was there—I don't recall now just how long I was there—but Santa Fe Springs, anyway, got overtime and I didn't; so we protested to Mr. Cagner. A short time after that there was a letter come out giving us overtime for emergency operating, but not for stand-by duty.

Q. Under what conditions did those instructions specify that you would be paid? A. Emergency operating.

Q. Is that the phrase used, or did they define it, or describe it in any way particularly? A. Emergency operating is defined as—let's see—I believe our instructions define that as something that is abnormal like the switch kicking out or something that requires us to come over and do actual switching or emergency operating of any kind.

Q. How are you paid for the rest of the time? A. I wasn't.

Q. You received a monthly salary? A. I received a monthly salary that was computed on hourly basis for eight hours a day.

Q. Did somebody instruct you as to that computation? A. I don't get what you mean.

Q. Well, as I understand it, at the time you were hired you were informed of a monthly salary of so many dollars a month. A. It was stated to me that it was paid on an hourly basis for eight hours a day.

Q. At the time you were hired that was stated to you?

A. It was a monthly salary, but it would be computed on an hourly rate for eight hours a day.

Q. Who instructed you as to that? A. Mr. Garrison told me that up in the Personnel Office, and Mr. L. L. Dyer told me the same thing.

Q. Did you make regular time reports while you were acting as a station attendant at Los Alamitos and Anita?

A. What do you mean?

Q. Did you have any time record that you made out?

A. Yes. We call in at 8:00 o'clock, and took readings from 8:00 to 12:00 and 2:00 to 6:00.

Q. Did you make any daily record for the report of your time worked? A. We had what we called daily time sheets at that time. In other words, it was made out each day.

Q. I see; and what did you show on that? A. Eight hours a day.

[Pp. 15/16, lines 25/14]:

Q. Do you live with your family? A. I do.

Q. How many children? A. One.

Q. Is it a boy or girl? A. Girl.

Q. When was she born? A. July 14, 1936.

Q. Does she got to school around here? A. My little girl goes to Holly Avenue School.

Q. Do you, in the evening, have occasion to take care of the little girl at all? Do you play with her or spend

time with her? A. Well, whenever I am over at the house, I do.

Q. Your family is over there; they live there with you? A. That is right.

[Pp. 20/21, lines 9/2]:

Q. Now, was your wife well when you were working at the job with the Metropolitan Water District? A. Yes.

Q. And she has been well ever since? A. No, she hasn't.

Q. When was she taken ill? A. She took ill somewhere around about March, 1940, I believe.

Q. What was the nature of her illness? A. Do you want the medical report or the chiropractic report? I prefer the chiropractic report, because they are the ones that made her well. She was slowly gassed by natural gas.

Q. As a matter of fact, Mr. Ellingsford, isn't it a fact that you indicated to the Company you would like this kind of a job in order that you could take care of your wife during the daytime? A. Hell, yes; but it's a hell of a lot better than this 24-hour relief, and being away all the time. I told them I wouldn't stay with the Company, if I couldn't change.

[P. 21, lines 9-14]:

Q. It is also a fact, is it not, that you were able to spend time during the day taking care of your wife? A.

Yes; but I didn't get any overtime for that, either; I mean, for nights when I had to get up and answer the local phone like that. I managed to put in my eight hours a day over at Los Alamitos.

[Pp. 36/37, lines 1/10]:

Q. By Mr. Sokol: Let me ask you this question—I will interject here—were you on an hourly rate of pay?

A. Yes.

Q. How is that arrived at? A. I will show you, if I can get my file here, sir. This is the first thing. It's the hourly rate table for operating department employees.

Q. Just tell us how your hourly rate was arrived at. A. Here is this month, according to our schedule (indicating).

Q. Do you have a regular table for these? A. We have a regular table. Now, this time we have 21 working days in this month, so eight hours a day is 168 hours. Therefore, at my rate, which is \$180.00, my hourly rate of pay would be 1.0715 for 168 hours.

Q. In other words, they take eight hours per day? A. That is right; they take eight hours per day.

Q. In computing the hourly rate you are not given any allowance for stand-by time? A. That is right.

Mr. Woodbury: By whom is this prepared?

The Witness: Southern California Edison Company.

Q. By Mr. Sokol: Then for the overtime you get time and a half that \$1.07? A. No; for the overtime—you see, according to Form Edison 100, the annual hourly

rate is computed as follows: Monthly rate times twelve months equals the yearly rate. The yearly rate divided by 52 is the average weekly rate, and the average weekly rate divided by 40 hours is the average hourly rate.

Q. In other words, your hourly rate times time and one-half after 40 hours based on the average annual hourly rate? A. Yes; the average annual hourly rate times one and one-half is our overtime rate.

Q. Based upon 40 hours a week? A. That is right.
[P. 42, lines 15-20]:

Q. Did you ever put down your stand-by time after 6:00 o'clock, I mean, on this sheet? A. No. They told me not to.

Q. Who told you not to? A. Every chief clerk of every division I have worked in. They said stand-by time was not allowed.

Attached is Exhibit 1 introduced in the deposition as a sample of the weekly time sheet, Exhibit 2, the daily time sheet, and Exhibit 3, the monthly time sheet as made out, showing an exact eight hours per day for normal time, and the overtime work. [P. 41, lines 19-22, p. 42/43, lines 24/10.]

WEEKLY TIME SHEET
WORK-WEEK BEGINS AT 12:01 A.M.

WEEK - PERIOD EMPLOYEE - INITIAL

FORWARD SHEET TO OFFICE AT END OF WORK-WEEK OR MONTH, AT TIME OF TRANSFER, LEAVE OF ABSENCE, OR SERVICE TERMINATION

HOUR OFF
FOR LUNCH

A.M.
P.M.

A.M. TO

NORMAL WORK

[illegible]

APPROVED

O.T. APPROVED

CHECKED & POSTED
TO FORM ED. 100

CERTIFIED CORRECT:

MEALS AT CO. EXPENSE
FOR HYDRO-GENERATION
DIVISION USE ONLY.

STATION CHIEF, FOREMAN, ETC.

SUPERINTENDENT

SIGNATURE OF EMPLOYEE

WORK - WEEK OR MONTH ENDED

DAILY OR
WEEKLY TIME SHEET

WORK WEEK BEGINS AT 12:01 A.M.

194

WEEK PERIOD EMPLOYEE—INITIAL			NORMAL WORK SCHEDULE		A.M. P.M.		A.M. P.M.		HOUR OFF FOR MEAL	
LINE	DATES	SHIFT	DESCRIPTION OF WORK		LOCATION		ACCOUNT OR JOB NUMBER		TOTAL HOURS	
1			NORMAL TIME							
2										
3										
4										
5										
6										
7										
8										
9			OVERTIME							TOTAL NORMAL TIME
10										
11										
12										TOTAL OVERTIME
13										
14										
MEALS AT COMPANY EXPENSE. FOR USE ONLY IN GENERATION DIVISIONS.			DATE						FORWARD SHEET TO OFFICE DAILY. AT END OF WORK WEEK OR MONTH, AT TIME OF TRANSFER, LEAVE OF ABSENCE, OR SERVICE TERMINATION, ALL DAYS IN WORK WEEK SHOULD BE SHOWN. USE NOTATIONS. "REGU AR DAY OFF." "HOLIDAY." "ILLNESS." "VACATION." "OFF ON OWN ACCORD." OR OTHER REASONS FOR DAYS OR HOURS NOT WORKED.	
APPROVED			O.T. APPROVED		CHECKED & POSTED TO FORM EDISON 100		CERTIFIED CORRECT:		SIGNATURE OF EMPLOYEE	
							194		PERIOD ENDED	
			SUPERINTENDENT		TIMEKEEPER					
			STATION CHIEF, FOREMAN, ETC.							

plan
diff
at 2

MONTHLY TIME SHEET

MONTHLY

1942

PAY ROLL NO. 36C

LOCATION - *Barro Colorado*

[illegible]

STAYING POWER

11

10. 10.1.10.10

[illegible]

OVERTIME

APPROVED

100

NORMAL HOURLY RATE \$ 1.67LS

1954

**AVERAGE ANNUAL
HOURLY RATE**

—

157
FIVE AND ONE HALF
IMINAC

卷之四

MONTHLY RATE \$180.00
DAILY RATE \$

11

OCCUPATION STATION CHIEF

13 July 113

NAME Michael J. Miller, Esq.

1. **THEORY**

...

VACATION

FROM _____ TO _____ HOW ARE _____

IN SERVICE _____ OUT OF SERVICE _____

2000

TRANSFORMED

H. S. KANEEN.

[Pp. 2/3, lines 25/9]:

Q. By whom were you employed; by what representative of the Edison Company? A. I saw Mr. Garrison and Mr. Short, and Mr. Cavner, in the Main Office.

Q. What were your instructions with reference to the duties of the job you were undertaking to perform? A. I understood that the job consisted of looking after and operating electrical equipment in conjunction with the substations; that the working hours were to be from 8:00 in the morning until 12:00 noon, and from 1:00 until 5:00; that we were to remain on the premises thereafter.

[P. 5, lines 1-26]:

Q. Did they each instruct you on different branches of your work, or the nature of your employment? A. Mr. Garrison gave the preliminary interview, Mr. Short identified the nature of the work, and Mr. Cavner clinched it finally. In other words, he was the one who greeted me into the organization. Mr. Short was the one who spent most of the time telling me the duties of the job, and what was to be expected.

Q. Was your salary fixed at that time? A. The monthly salary was quoted.

Q. At what rate? A. \$110.00 a month.

Q. What was said to you with reference to where you were to live?

Mr. Sokol: Are you referring—

Mr. Cunningham: When he first went to work.

The Witness: No reference was made in regard to my personal home; however, it was stated that I would remain in the relief quarters while working at one station for a period of 24 hours each working day.

Q. By Mr. Cunningham: When you first came to work, you were working as a relief operator? A. That is right.

Q. When did you cease your work as a relief operator and become a regular attendant at a substation? A. I believe that was the 1st of February, 1942.

[P. 6, lines 15-24]:

Q. Now, what were your instructions with reference to how continuously you were to stay on the substation property, including the residence? A. Including the residence?

Q. Yes. A. Twenty-four hours a day.

Q. How many days a week? A. At the beginning it was five days a week, and later we went to six days a week, ahead of the rest of the system, on the Western Division.

[P. 7, lines 6-9]:

Q. Yes, I know; but in the various stations you worked at, after you became station chief, were the duties practically the same at each substation? A. Yes, they were.

[P. 12, lines 11-14]:

Q. Well, did you put in an average of eight hours every 24 hours in those active duties? A. Some days it would run quite a bit over that, and other days it wouldn't come to it.

[P. 16, lines 9-23]:

Q. So your statement is that you think you spent practically a full eight hours in active duties, based on your recollection of the nature of your work there? A. That and the fact of what was required.

Q. You mean to say that you had instructions that you were to be physically active eight hours a day? A. We were to be present on the station grounds and busy ourselves.

Q. Well, could you find enough work to do to keep busy eight hours a day? A. A station requires quite a bit of study; and if you call learning your equipment, where all of the various control circuits go, what to do in case of trouble, active duties, I should say most of it will occupy most of the time.

[P. 17, lines 16-24]:

Q. Can you give us any estimate of the amount of time you spent during the daytime on those studies and writing examination papers?

Mr. Sokol: You are now referring to the hours between 8:00 and 5:00?

Mr. Cunningham: 8:00 to 12:00 and 2:00 to 6:00 or 1:00 to 5:00.

The Witness: I don't see how I can pro rate any such figures mentally.

[Pp. 18/19, lines 15/11]:

Q. Did you ever do any vegetable gardening during the day? A. We had a vegetable garden on the cottage side, a small one.

Q. Did you raise enough vegetables for your family use? A. I believe not. We had a very nice case of nematodes up there.

Q. Well, what percentage of your vegetables did you raise?

Mr. Sokol: I don't believe he testified that he raised them. He said, "We had a vegetable garden."

Q. By Mr. Cunningham: You didn't do any work in the vegetable garden? A. During what time?

Q. During the daylight hours, generally? A. You can't very well do any work in a vegetable garden after dark.

Q. Did you do any work in your vegetable garden between the hours of 8:00 and 12:00, and 1:00 and 5:00?

A. Let's put it this way: I was required to maintain the grounds of both the cottage and the station, as part of my Company duties. Is there any difference between raising vegetables and raising flowers or grass?

[Pp. 21/23, lines 15/2]:

Q. By Mr. Cunningham: During the whole 24-hour period, outside of being present on Company property at the house or at the substation, did you have any other form of activity not required by the Company's instructions to you in connection with your duties as a station operator? A. Well, certainly.

Q. What were they? A. Being a normal human being, I ate and slept.

Q. Well, how much did you sleep? A. I don't sleep a great deal. I get by quite nicely on six or six and a half hours sleep.

Q. Each night? A. Yes.

Q. And that represented the normal time you slept, did it? A. I believe so. Pretty close.

Q. You ate three meals a day, I suppose? A. That is right.

Q. What else did you do? A. Other than the activities that had to do with eating and sleeping, outside of the preparation for eating and the preparation for going to bed and getting up, the time was pretty boring.

Q. How's that? A. I say the time was pretty boring.

Q. What did you do, if anything? A. Well, what are you driving at?

Q. I am trying to find out how you spent your time. How did you spend your evenings?

(Objection of counsel omitted.)

The Witness: A portion of the time was spent in reading.

[Pp. 23/24, lines 13/3]:

Q. Do you have any children? A. We have a boy.

Q. How old? A. He was born in 1942.

Q. Did you spend any time with him? A. I believe the normal amount.

Q. Helping take care of him? A. Nothing other than watching him and keeping him amused, and playing with him.

Q. Playing with him? A. And being with him.

Q. Did you receive at any time anything in addition to your monthly salary on account of any work you did between the hours of 8:00 a.m. and 12:00 noon, and 1:00 p.m. and 5:00 p.m.? A. When we started six days a week, the sixth day was paid at the rate of time and one-half.

[Pp. 26/27, lines 6/14]:

Q. As part of your duties, were you required to make any written reports regularly? A. That is right.

Q. What were they? A. I took daily readings on the hour during the normal scheduled working hours from 8:00 in the morning until 5:00 in the evening. I was required to make weekly battery checks and reports. I was required to write a monthly station letter, and to make out an operating report monthly.

Q. What with reference to time reports? A. We were required to make out our own time sheets.

Q. Did you make those out every day? A. They changed the forms on those. For a while we had a daily time sheet; then they changed it to a weekly time sheet. It was posted daily, however.

Q. Those time sheets show the hours worked? A. They merely state that we spent eight hours. I believe that was the form in which they wished to have them.

Q. Those hours were filled in by you? A. That is right.

Q. What hours did they tell you to show?

Mr. Sokol: Read the question.

Mr. Cunningham: I understood him to say he was given some instructions on that point.

The Witness: I believe the form had a place for the person's signature, the date and the nature of the work upon which he worked, and the number of hours spent at it. In other words, for any one day, say at Carpentaria, I gave the station name, "Carpenteria," the date and "Operating Substation, 8 hours." That would be totaled up at the bottom.

Q. By Mr. Cunningham: Would those hours show with reference to the time those hours spent occurred with reference to the clock? A. I believe up at the top it said from 8:00 till 5:00, but I will not swear whether it did or not.

[P. 30, lines 17-26]:

Q. Would you say that while you were in this substation work you spent more or less time with your wife and your son than you do since you came down to this job at the Steam Plant? A. I, very naturally, spent more time with them on that job, because of the nature of this job. This job involves shift work, which means that during the time the wife and child are normally

awake for one month out of six weeks, I will normally be asleep. I don't live the same hours that they do.

[Pp. 33/34, lines 1/25]:

Q. Getting back to a question I asked you some time ago about the time you spent in active work doing the duties assigned to you at the substation, you said you spent considerable time studying. If you eliminate the time you spent studying during the period from 8:00 until 12:00, and 1:00 or 2:00 to 5:00 or 6:00, what time would you spend in performing the actual physical duties assigned to you around the substation and the yard? A. I don't feel I can give any approximation of that.

Q. Well, you didn't spend all of the eight hours that way, did you? A. In active physical duties?

Q. Yes. A. No.

Q. Can't you give us a fair estimate of the time you spent in actual physical duties? I mean actual duties that required physical efforts. A. I think not. They were so diversified in nature. In other words, one week you might have a gang there and you would be working very regularly and steady, and for more than eight hours during the day; and the next week, why, you might be having inclement weather, and might have a good deal of time for reading and study.

Q. During the 8-hour period from 8:00 to 12:00 and from 1:00 to 5:00, were you required to stay in the substation proper? A. Not necessarily.

Q. What do you mean by that? I am not asking you whether you did, but whether you were required to. The answer ought to be yes or no, shouldn't it? A. It all depends on what you mean by the substation proper.

Q. The substation building. A. No. Such an arrangement would not provide time to do any of the neces-

sary yard work outside the building, or the work over on the cottage.

Q. Were you permitted to spend any of that time in your house? A. At times we were requested to.

Q. To spend some time in your house? A. Uh huh.

Q. Well— A. Because in the nature of the work, it was commonly required that painting be done within the house, because that was also Company property. You might spend three or four weeks in the house, just painting it.

Q. Were you permitted to stay there at times when you were not ordered to stay there? A. There was, I should say, complete freedom of motion between the station and the cottage grounds, because they were one and the same.

[Pp. 38/39, lines 6/2]:

Q. By Mr. Sokol: Did you receive an order from the Company, an instruction to the effect that 40 hours of work shall constitute a work week while you were in the substation? A. Yes.

Q. Now, did you receive time and a half for such time after 40 hours while you were working in a substation? A. Yes.

Q. You have already explained that it depended upon the clerk, the division clerk. A. All such time had to be O.K.'d by the division clerk.

Q. I see. However, the specific time that you got paid time and a half for was when you were actually answering emergency calls over at the station? A. Other than when we went on a six-day operation, yes.

Q. I see. When the Government ordered that the 48-hour week should apply to this Company, that is, generally to the industry and this Company, at that time you got

eight hours of overtime for the sixth day? A. That is right.

Q. At time and a half? A. Yes.

Q. Time and a half your hourly rate? A. Yes.

[P. 40, lines 8-16]:

Q. By Mr. Sokol: What do you mean by "stand-by time"? A. Stand-by was time that was required that you spend on the substation property.

Q. Who told you you had to spend that time? You were instructed to that effect? A. Yes.

Q. Well, were you relieved on occasions from the stand-by time? A. Only on our days off.

[Pp. 47/48, lines 16/6]:

Q. Now, in addition to the log book there was a daily time sheet that you made out, and later a weekly time sheet? A. That is right.

Q. You didn't put your stand-by time on that? A. No.

Q. Why not? A. There was no place to put it.

Q. What do you mean by that? A. There was no blank left on there to put it. In other words, you filled the form out in the manner requested by the Company.

Q. Was your schedule of hours also put up in the station; I mean your 8:00 a.m. to noon, and 1:00 p.m. to 5:00? Was there a schedule posted in the station?

A. That was in the orders.

Q. In the orders? A. Yes.

[P. 50, lines 15-20]:

Q. Did you ever do anything on the substation grounds or at your house that gave you any form of financial return outside of that received from the Company? A. I might possibly have received small financial

gain from selling something I had boughten before, or trading it to some one else there; I mean, for something else I wanted.

[P. 55, lines 14-24]:

Q. Let me put it this way: while you were working on your radio equipment, or studying radio, is that part of the time you compute as overtime for which you should receive pay on an overtime basis? A. I will say that time I spent in operation, or waiting to operate station equipment, I feel is overtime.

Q. And what portion of the time did you spend in waiting to operate? A. Well, if you consider lying on your back with one ear open, asleep, so when the alarm bell or the phone goes off you're up like that to get it, it is all inclusive.

VERNON B. WERT.

[Pp. 3/4, lines 14/24]:

Q. Do you remember who first employed you on behalf of the Edison Company as a substation operator?

A. Yes.

Q. Who was it? A. Mr. Dyer.

Q. Did he give you your instructions with reference to your duties in that position? A. Yes.

Q. Have those instructions been materially altered since that time; or have you continued to work, to a large extent, under those instructions that he gave you? A. I have continued to work under the instructions he gave me. There have been changes from time to time that have been affected by orders that have been put out, not only by himself, but by his successors.

Q. Did he arrange with you for the basis of your compensation when you began to work? A. He established the amount of money that I was to earn, yes.

Q. On what basis were you paid when you first began to work? A. I was given a monthly salary, my house and my electric energy.

Q. What were your instructions with reference to your hours of work? A. I can't remember that; however, the station that I first went to as a substation operator was a one-man substation, and we were not to leave the property. It was our duty to do whatever was required of us, and the statement by Mr. Dyer remains in my memory as having been "The hours of employment are what the job requires."

Q. And you were required to stay there 24 hours a day, except on your days off. Is that correct? A. That is right.

Q. Has that been the continuous practice ever since that time? A. Yes.

[Pp. 5/6, lines 19/6]:

Q. Cardiff is what you might call a two-man station? A. Yes; it is a 24-hour station, but it has been considered that there is just a little bit too much for one man to do there, so they put two men in there.

Q. Does each man have a house of his own there? A. Yes, sir.

Q. On your nights off you are at liberty to leave the substation premises? A. Well, you understand, we divide this responsibility of standing by between the two men.

Q. That's right. A. One certain night would be my night to do as I pleased, and the next night would be his night to do as he pleased.

[Pp. 8/13, lines 26/21]:

A. Each one makes out their own daily time sheets.

Q. What were your instructions with reference to making those out? A. That is a rather involved question, and you would get a rather involved answer. You have to go through a whole lot of stuff; but, in effect, it amounts to the fact that each day you work eight hours. At the conclusion of five days you would have had in 40 hours. We are now working six days a week, so that means that the sixth day in the week would be an over-time day, and it is so recorded.

Q. In these time reports that you each make out, what is your practice with reference to showing the time or the hours worked? Which is it you show, the hours worked or the time during which you worked? A. We don't show the times that we worked.

Q. I mean by the clock, the time shown by the clock? Do you show the time, so to speak, when you go on duty and when you go off duty, or just so many hours worked? A. We put down the date and what we were doing. There are various charge numbers assigned to different types of work, but our work is considered as operating; so following the date at the left-hand side we put down "routine operating," then the station name, the charge number and the hours that we worked.

Q. Eight hours? A. Yes.

Q. You put that down regardless of whether you worked more or less than that time, do you? A. Oh, no. If we work more than eight hours, why, then, we put in for overtime for that. That goes in a different section of the time sheet.

Q. On the same form? A. On the same form.

Q. What if you work less than eight hours; what do you do then? A. We put in eight hours.

Q. You mean you do work eight hours every day? A. We do put in eight hours every day.

Q. Active work every day? A. We do what is necessary to operate the station, yes. We have certain routines that cover a definite period of the day in which we put in eight hours.

Q. Does it take all of the eight hours to follow that routine? A. We take our readings each hour, keep our lawns and shrubs up. We have to keep certain records, and keep track of the load and temperatures, yes.

Q. You have no leisure time at all during the 8-hour period? I mean when you have gotten everything done that you are supposed to do? A. I wouldn't say that we were constantly applying ourselves to physical work at all times during the eight hours. There are times when you might sit down and take a deep breath and think about what the radio program that night might be going to be. No, I've never found that the Company was a slave driver or a stickler for the detail of putting in exactly an 8-hour day.

Q. In other words, if you had accomplished your assigned tasks, you didn't feel obliged to keep busy? You could sit down and wait for the next task? A. It would take the entire daylight period to accomplish our assigned tasks, because our assigned tasks consisted of taking readings—

Q. What? A. Consisted of taking readings on our instruments, keeping track of our temperatures, and generally seeing to it that the station is operating correctly. In my particular locality the temperatures rise pretty rapidly. There is a 50 to 55 degree raise during the day—

time. And we have transformers with peculiar characteristics that heat up pretty rapidly, and it could be that it would be necessary to put more forced draft on to our blowers during the daylight period than it would be necessary to put on at night. In other words, we are familiar with the situation at all times.

Q. Well, these intervals you say that do occur when you can take a breath, how long do they last? A. Outside of a general routine, it wouldn't make much difference. There might be a day when a fellow felt a little bit indisposed, and he wouldn't do much that day; but he would do a lot tomorrow. Maybe he doesn't hoe any weeds today, and hoes twice as much tomorrow. Or you might have switching to do, which sets you back; but the following day you'd catch up. I try to put in a conscientious day's work on the job.

Q. You are actively busy most of the time? A. I am actively busy most of the time, and try to keep my own yard and grounds up, in condition which would reflect credit to the Company. I don't like to see a weed patch; and if you've been around over the system, you will probably notice they are generally pretty well kept up.

Q. By your own yard and grounds, you mean the grounds around the house? A. The grounds around the house and the grounds around the station, yes. It's on the station property.

Q. You said you kept those up and also around your own. You mean around your house? A. Yes; between our house and the street, I just finished cleaning the weeds out in there. There is a hedge over there that takes two or three hours to crop that back and rake up the mess that is left.

Q. Do you have a lawn around your yard. A. Oh, yes.

Q. And the mowing of that is part of your eight hours' work? A. We have always considered it to be that, yes. It wouldn't make a great deal of difference what we were doing, as long as we were in sound of our bells, so that we could answer them. There's no more difference in the daytime than at night, for that matter.

Q. Well, at 4:30 or 5:00, your 8-hour period ends, does it? A. At 4:30 on those certain nights that I have mentioned, one or the other of the men is at liberty to do as he pleases.

Q. Well, the one that isn't at liberty, what does he do then? A. Well, he stays there. He sticks around.

Q. At the station or at his house? A. No, he doesn't stick around the station. He can go over to the house, because there is an alarm bell there that would let him know if there was anything happening at the station, and there is a telephone there, so if anybody wanted him he could hear the phone ringing, and answer it at the house. There are extension bells and phones in both houses, I might say.

[P. 17, lines 14-24]:

Q. You are both on duty, as far as active work is concerned, then, at the same time, except on your nights off and days off? A. We are actually both on duty now from 8:00 o'clock in the morning until 6:00 o'clock at night, or an 8-hour period between 8:00 a. m. and 6:00 p. m. It doesn't make any difference which eight hours you work. You can work from 9:00 to 6:00, or you can work from 8:00 to 6:00, and take a couple of hours off in the middle of the day for dinner, or any way you

wish. There is the 8:00 a.m. to 6.00 p.m. period in which we put in our eight hours.

[Pp. 18/19, lines 24/12]:

Q. Now, each month you get your regular pay check. Did you receive anything else for any overtime worked?

A. Any hours that we were not on duty, that would be the hours that we considered ourselves to be on call or on stand-by. In the event we were actually called out, we were permitted to put in a reasonable amount of overtime.

Q. And you listed that on your time report? A. Yes; that was entered on our time sheets.

Q. Did you make any check to see whether or not it would be approved before you put it in on your time report? A. No, I didn't. I talked with my division superintendent about various amounts of time that would be allowed for doing various sorts of work, and we seemed to be more or less in agreement on all of them. I don't remember of ever having that questioned.

[Pp. 19/20, lines 22/17]:

Q. Can you tell us what your plan was in asking for overtime credit? A. Well, roughly speaking, when we answered a station alarm that had us get out of bed to normalize our station, no objection was ever made to our putting in hour's overtime; but when we were required to answer telephone calls from a consumer that required certain other telephone calls as a consequence of the original consumer call, if you see what I mean—it might be one, it might be two, or it might be a half a dozen—we figured our overtime on the basis of 15 minutes for each one of the incoming calls. That doesn't mean that we're going to get 15 calls in a 5-minute period that we would

put in for 15 minutes for each one of those calls. We figured that if at exactly two minutes after 1:00 in the morning, or five minutes after 1:00, let us say, in the morning, a man got a telephone call and there was some trouble that needed attention, why, then, we figured that we've got 15 minutes to conclude this transaction before we are actually entitled to go back to bed. Now, as a matter of fact, maybe it only took us five minutes, or it may have taken the full 15; but there was never any question about that.

[P. 30, lines 12-16]:

Q. Most of the evenings when you were not off, you spent in your home and not in the substation? A. Now?

Q. Yes. A. I spend it in the house.

[Pp. 31/32, lines 22/10]:

Q. Did this paper work thus occasioned cause you to work actively more than eight hours on the days when you had this extra paper work? A. No; I never spent more than eight hours a day to do the work I was supposed to do. I never put in any overtime for doing paper work. If I couldn't do it that night, I waited until the next day. Then if there was a working party there the next day, finally, after a certain period of time, you would end up with quite a little clerical work to do.

Q. When was the last time you raised chickens or rabbits? A. About 1922. Pardon me; if you mean on the job—

Q. Yes. A. Yes; about 1923, I think it was.

[P. 35, line 2]:

By Mr. Sokol:

[Pp. 37/39, lines 3/17]:

Q. Now, we have been referring specifically to the years 1942, '43 and '44, up to the present time. Will you state whether or not during the first part of 1942, or, specifically, on January 1, 1942, an order was issued signed by Mr. Cavner and Mr. Tice relating to the hours of duty? Do you know that there was such an order?

A. Yes. That was known as Substation Department Order No. A-36.

Q. Who is Mr. Tice? A. He, at that time, I think, was Manager of Operations.

Q. Who is Mr. Cavner? A. He was the superintendent of substations.

Q. Will you state whether or not that order provided that you would have to be on call 24 hours a day? A. It did so stipulate.

Q. Will you state further whether or not that order provided that your compensation, however, was not to be based on 24 hours a day, but on 40 hours a week? A. That is right.

Q. Is it a fact that you have received certain overtime after 40 hours in the work week? A. We have.

Q. Up to the time that the Manpower Commission changed the work week to 48 hours. Is that correct? A. That is right.

Q. Despite that change, your regular work week has been 40 hours a week? A. It's 40 hours a week.

Q. It is 40 hours a week? A. Yes.

Q. The only difference is that you get an extra eight hours of overtime? A. That is right.

Q. Now, you stated that you did get some overtime, for instance, in answering those telephone calls that you mentioned? A. That is right.

Q. How was that overtime based? On what method of computation? A. It was one and one-half times the average annual rate.

Q. Wasn't it the average hourly rate? A. The average annual hourly rate. I beg your pardon.

Q. In receiving your pay, then, you considered that you were receiving pay for eight hours a day? A. That is right.

Q. Nevertheless, after you worked your eight hours a day, you did remain on duty. Is that correct. A. I remained on call, on the job.

Q. On the job? A. Yes.

Q. I call it "on duty". Is there any difference? A. Well, we weren't supposed to say that we were on duty after we put in our eight hours.

Q. I see. As I understand it, you were on duty for eight hours? A. That is right.

Q. Then you went on call for the period thereafter? A. That is right.

Q. Were you required by any Company instructions to remain on call continuously for the balance of the 24 hours?

I mean, could you leave the premises? A. We have this Order A-36 that says certain employees are required to remain on the job 24 hours a day, or words to that effect.

Q. Did you do that? A. Yes.

[Pp. 41/42, lines 19/3]:

Q. In computing the overtime that you were paid—you were paid some overtime; is that correct? A. Yes.

Q. In computing that, was that based upon an 8-hour day, five days a week when you were working five days a week? A. Based on a 40-hour week, yes.

Q. It was based on a 40-hour week? A. Yes.

Q. In other words, it was time and one-half after the 40 hours? A. That is right.

[Pp. 42/43, lines 17/11]:

Q. Did you ever receive any pay for the stand-by time? A. Not as such.

Q. It was only when during the stand-by time you had an emergency call?

(Statement of counsel omitted.)

Q. By Mr. Sokol: What do you mean by stand-by time, Mr. Wert? A. Time when you are off duty, but on call.

Q. Now, during some of that time, while you were on call, you did receive calls to the station for emergency work. Is that right? A. That is right.

Q. And you did receive some overtime for some of that time? A. That is right.

Q. Was there another order issued in January, 1943? That is, was Order No. A-36 revised in 1943? A. Yes; there was a revision issued, dated January 1, 1943.

[Pp. 48/49, lines 17/13]:

Q. Well, now, when was there any change in that setup, if any? A. Well, we started, as far as I know, strictly on a 40-hour week some time in 1941, I believe it was. I am not absolutely certain about that, but the reason that I recall that was because prior to that time we had relief schedules that gave us eight or nine or ten days off a month, depending upon how many Saturdays and Sundays there were in that month. We were working five days a week, and that's the way we arranged it. But along about the early part of 1941, I think it was, they told us we couldn't do that any more; that according to

the Wage and Hour Law it was going to be necessary for us to take two days off each week. In other words, we could only work 40 hours in a week, and then we would take two days off. Well, it figured out that a man could get a Saturday and a Sunday, and that would be his days off for that week. Then he could take Monday and Tuesday, and that would be days off for that week, and that would give us as many as four days. Well, when you divided that sort of a scheme up through a rotation of the relief schedule among three men, the result was that about every four weeks, or every three weeks you got four days off, I think it was. I think that's the way it worked out.

[P. 51, lines 4-14]:

Q. But, at any rate, within the last year or two you have been receiving some overtime payments for unusual or out-of-the-ordinary tasks? A. Yes.

Q. Being called for telephone calls, and so forth? A. When you're on call and called out in a case of trouble, you were permitted to put in for overtime for the handling of that case of trouble.

Q. But at any time have you ever been paid anything outside of your regular monthly salary for being on call? A. No; I never received anything for being on call.

[P. 52, lines 6-12]:

The Witness: Our time slips—and I have copies of the time slips for my own information that I have kept since I went to this Cardiff station, and on each week's time slip we show that we work 40 hours, and we also show the amount of overtime that we've worked. In the case of the sixth day, that's an overtime day. That is totaled in a column at the right-hand side of the sheet.

[Pp. 54/55, lines 15/4]:

Q. All right. Now, were you advised that it was due to the Wage and Hour Act that they went on the 40-hour week? A. I don't remember.

Q. Well, anyway, you do know you went on a 40-hour week? A. That is right.

Q. And that your monthly rate was broken down to give you an hourly rate based on 40 hours week. Is that correct? A. Our monthly wage was broken down to show the hourly rate that we earned in that month, yes.

Q. Based upon 40 hours in the week? A. That is right.

Q. It was not based upon 24 hours in a day, was it? A. It never has been.

Q. It was based upon eight hours a day, five days a week, or 40 hours a week. Is that correct? A. That's correct.

(3) HYDRO STATION ATTENDANTS.

M. E. ROACH.

[Pp. 4/5, lines 22/14]:

Q. Now, will you tell me the duties of a hydro station attendant? Please remember, Mr. Roach, it isn't a question of trying to confuse you. I don't know anything about your work and electricity, except that when you press a button you generally get it—and in my car sometimes you don't. A. Well, it consists of checking the equipment, such as transformer temperatures, bearing temperatures, oil levels on transformers, oil levels on bearings, governor oil pressures, and different incidental things around the station. Your switchboard is covered with a bunch of meters. You glance over those and tell whether they are normal or not. If they are not normal,

why, you correct the trouble, if it is possible, in your station. After that is all done you do your janitor work, such as mopping up oil, any janitor work that you may have, dusting, cleaning windows; and there is always a certain amount of paper work to be done around a station like that. What I mean by "paper work" is your log book that you have to keep up, your operating reports and switching reports.

[Pp. 7/9, lines 20/12]:

Q. How long would it take you to do the physical work that you have described, the reading of these meters and checking? How much of your time would that take?

A. Well, we will say two hours in the morning and an hour in the afternoon.

Q. What other duties, if any, did you have to perform? A. I worked in the maintenance shop. When I would get back from my inspection in the morning, I went to work in the shop.

Q. What is the maintenance shop? A. Well, that was where the equipment, the lathe, and all of that kind of machine tools were housed.

Q. Did you have any regular duties there? A. Well, I was told to help the machinist; so you might say I was under his jurisdiction when I got in there.

Q. What I mean is, was there any regular thing you had to do, or did you just do what you were requested or directed to do? A. Well, whatever maintenance work or repair work was going on, I helped do it.

Q. What were your hours supposed to be? A. 7:30 to 4:30 with an hour for lunch.

Q. What do you base your claim for overtime on? A. I don't understand the question.

Q. Well, you are suing for a claim of overtime which you haven't been paid for. On what do you base that claim? A. I call it standby time.

Q. Well, tell me on what you base that. A. I was there on the property. I had to live on the property. I couldn't go and come as I pleased.

Q. Did you have any work keeping up the yard? A. Very little. There was a utility man there that done most of it.

Q. So, as I understand it, your regular hours of work were 7:30 in the morning to 4:30 in the afternoon, with an hour off at lunch? A. That is right.

Q. You have given us your estimate, which I won't repeat; and instructions were when you finished up you were to go into this machine shop and assist the man there? A. That is right.

Q. Now, why didn't you leave the property at the end of your day at 4:30? A. I was told when I went there it was a 24-hour job, and I was to stay there.

[P. 10, lines 1-22]:

Q. Well, anything that you think will give us any light on the subject. A. Well, I went to work in '27. I worked on Kern River to '32. In January of '32 I was asked if I would take this job at Kaweah, and I was told that it was a 24-hour-a-day job.

Q. Who asked you? A. This Mr. Robertson.

Q. Go ahead. A. And he told me it was 24 hours. At that time we worked physical labor to noon, and was there the rest of the time, but that was changed later.

Q. Well, what was changed later? A. It was later that we worked eight hours during the day, and stood by the rest of the time.

Q. What were you supposed to stand by for? A. For station disturbances, to catch anything that was wrong with the station. There is an alarm bell in the cottage.

Q. Go ahead. A. Along with the alarm bell there are three telephone lines.

[P. 12, lines 4-15]:

Q. When did they first start paying you any overtime? A. June of '41, I believe. It is kind of hard to recall dates that far back. It is for me, anyway.

Q. I won't charge you with fraud, if you don't get the dates right. I don't remember, myself. The best you can remember, approximately, is about June of '41? A. I believe that is when they started paying overtime.

Q. What did they pay overtime for? A. For the time that you were called out.

Q. After normal hours? A. After 4:30 in the evening, or before 7:30 in the morning.

[Pp. 13/14, lines 20/26]:

Q. Now, since then you have been paid overtime for any active duty that you performed after 4:30: that is, while you were in this position? A. As far as I know, I was.

Q. Who kept your time sheets? A. I kept my own. That is, I put the hours on it and signed it, and it went into our Canyon office.

Q. That is what I am asking you. Did they furnish you daily or weekly time cards? A. One time we worked on a daily, then went to a weekly, and then went back to a daily.

Q. Those cards had some space on them to show overtime? A. The card does now. I can't recall just how the other cards were made up, but I am sure they did.

Q. You put down all the overtime where you worked actively over an hour? A. Yes.

Q. I understood you to say if you worked less than an hour you ordinarily didn't put in a claim for it? A. Not ordinarily; unless, maybe, tonight it was 45 minutes and tomorrow night it was 45 minutes. You could recall that much, but as far as keeping track of your time back, it wasn't done, or, at least, I didn't do it.

Q. You haven't any record of it? A. No.

Q. Well, then, I understand that if you had any during the week, or if you had any protracted spell, even if it was less than an hour, you could remember that and put it down; but if it was 10 or 15 minutes you didn't try to keep track of it. Is that correct? A. No.

Q. I say, "Is that correct?" A. That is.

[Pp. 15/16, lines 13/7]:

Q. Did your family live with you? A. Yes.

Q. What does your family consist of? A. My wife and one child.

Q. Boy or girl? A. Boy.

Q. How old? A. He is eight years old, now.

Q. About how much time would you think you spent with them: just an average, approximately? A. You mean the hours a day?

Q. Per day, yes; or per week; whatever way you want to establish it. A. Well, that is hard to answer. Some nights I wouldn't be called out, and I'd be there all evening until bed time. Other nights I wouldn't be there, maybe, 30 minutes; just long enough to eat.

Q. After 4:30 you were at liberty to do anything you pleased with your family, so long as you didn't go beyond the hearing distance of the alarm. Is that correct? A. That is right.

[P. 20, lines 20-26]:

Q. By Mr. Sokol: At the close of the normal work day did you make a report to the switching center? A. Well, about 4:15 in the evening.

Q. What was that report? A. Well, it was a reading; the weather, kilowatt hours generated, the amount of water in the river, water used in the station.

[P. 22, lines 5-19]:

Q. Prior to 1941, when you started getting paid for overtime, were you called out more or less? A. More.

Q. Since 1941, your call-outs during which you got paid overtime have been less? A. Yes.

Q. I think the Court might be interested in knowing just what work you put in there in the so-called standby time, the actual work. Now, during a storm you might be called out for as long as an hour or more? A. Yes; or you might be called out and be out half the night.

Q. You got paid from the time you left the premises to the time you returned? A. Yes; if it was over an hour or fraction.

[Pp. 23/25, lines 24/8]:

By Mr. Sterry:

Q. Just a few questions, Mr. Roach. In normal times, laying aside storms and unusual conditions, normally how much time would you think out of the 24 hours you spent eating and sleeping? A. Well, that is hard to say. Sometimes you sleep more than others.

Q. Well, I know that; but I am asking you for an average; just the normal average. A. Well, say we slept seven hours, and say two hours for meals.

Q. I understood you to say that sometimes you had been interrupted, but on an average how much of the time did you spend in the company of your wife and child,

aside from eating and sleeping, playing with your child and conversing with your wife? How much would you think that would average? A. That is hard to say. I don't think I could make an average of that.

Q. Well, your boy was very young at that time. I suppose you played with him as much as you could, didn't you? A. Oh, when he was awake, I suppose I did.

Q. Well, how old did you say he was now? A. Eight years old.

Q. How old was he at the time you left this job? A. Well, that was two years back.

Q. He would be six? A. Well, possibly five.

Q. Between five and six? A. Yes.

Q. That is a very interesting age in my judgment. Didn't you play with him then? A. Oh, I can't recall that I did. I suppose I did. Any father plays with his child, but I never gave it any thought then, and I can't figure it out. I don't see how you could figure it out now, correctly.

Q. You couldn't give any estimate of what time? A. No.

[Pp. 26/27, lines 6/9]:

Q. Do you remember what you showed on your time card at that time when they weren't paying overtime? A. At that time we were told to put eight hours only on our ticket.

Q. And you put eight hours on it? A. We did.

Q. And part of the time, until this change was made, you didn't work beyond noon? A. Well, we were there.

Q. I know; but I mean you didn't perform any actual active service? A. Only on my own personal lawn around my house. I kept that mowed and watered, and such things as that, which wasn't necessarily considered Company work.

Q. I know; but your actual active work—let's leave aside standby time—was until noon, and then later it was changed? A. Yes.

Q. In that time, no matter what it was, you just put eight hours in there? A. Yes.

Q. And then after the overtime came in, you put the overtime in as and when you were called out? A. Naturally.

Q. Who told you to show just eight hours on your time card? A. I can't remember, now.

Q. But it was either at the time you went there or shortly after they told you to show eight hours? A. Yes.

CLARENCE ROGERS.

[Pp. 2/3, lines 21/12]:

Q. Tell me your age and where you live? A. I live at Three Rivers, California, Power House No. 1. My age is 40, I guess.

Q. Are you married? A. That is right.

Q. And have a family? A. One son.

Q. How old? A. Eight.

Q. Your wife is living with you? A. That is right.

Q. Where do you live; in your own house, or on Company property? A. On Company property.

Q. You said Power House No. what? A. No. 1.

Q. You don't live in the power house? A. Oh, no; it is nearby.

[Pp. 5/6, lines 16/26]:

Q. Now, just realizing that I know nothing about the generation of electricity, tell me just what you do there.

A. What I do?

Q. Yes. A. Well, we have the two plants there to take care of. I have to make regular inspections at 7:30 in the morning, 3:30 and 4:00. I have to keep the place clean, and see that all mechanism is functioning properly.

Q. What do those inspections consist of? You must remember they mean everything to you, and don't mean anything to me. A. You have your bearings there, all of your relays, your governor that you have to keep oiled. You have to check your oil in your bearings.

Q. The station is, I think you said, an automatic one. Is that right? A. Fully automatic.

Q. It runs itself from the power generated there? A. That is right.

Q. How long does your morning inspection take you?

A. It will take me about four hours to make the rounds through both places, sometimes longer, cleaning them up, and the like.

Q. When you speak of cleaning up, do you mean to include work on machinery, or just sweeping up? A. Well, it is dusty around that place, and the rotation of those generators pull all the dust in, and you have to wipe up all over the floor and all over your machinery.

Q. All right. Let's break it down for just a minute. How long will it take you to make the inspection of your machines and your gauges, and do any oiling of machinery without dusting, if you can give me an estimate of that. A. I would say I could do it in an hour.

Q. Both places? A. Both places.

Q. And the other three hours you would take to do what? A. Cleaning the place up.

[Pp. 7/9, lines 24/13]:

Q. Then, altogether, you figure that it takes you about four hours to make your original inspection and clean up the two plants? A. Yes.

Q. What time do you start in the morning? A. 7:30.

Q. And that takes you, then, until about 11:30? A. That is right.

Q. Does that include your automobile trip between the two plants? A. It includes the trip between the two plants, yes.

Q. At 11:30 what do you do? A. I usually work in the shop with the electrician.

Q. Until when? A. Well, from then, if I have my grounds all cleaned up, until around past 3:00.

Q. Don't you take any time for lunch? A. Oh, yes; an hour out for lunch, to be sure.

Q. You start at 7:30? A. From 7:30 to 12:00.

Q. You get back at 11:30, and you take your lunch, then, between 12:00 and 1:00? A. Between 12:00 and 1:00.

Q. Then when do you have to make your next inspection? A. The next inspection comes at 3:30.

Q. How long does that take you? A. Well, I've got to get back and make my inspection at No. 1 at 4:00, work up the data and report it to the switching center.

Q. How long does that take you? A. That will take an hour.

Q. So that you will generally be through, then, at 4:30? A. 4:30.

Q. Then what do you do? A. What do I do after that?

Q. Yes. A. Well, for the last four years I have been, what you might say, studying.

Q. What? A. The operations of the plants along with an electrical course.

[Pp. 13/14, lines 23/17]:

Q. By Mr. Sterry: Now, at your place, your duties, so far as inspections are concerned, were over at 4:30, weren't they? A. So far as my eight hours was concerned, they were up at 4:30.

Q. All right. Now, where did you go, then, generally, following this course of study? A. They have an office, what I call an office, that the Company has their alarm system in, adjacent to what you might say is my bedroom. I usually go in there to do my studying, where there isn't any noise from the radio, and it is more or less quiet, other than telephone bells.

Q. When did you have your dinner? A. Oh, around 5:00.

Q. What did you do after dinner? A. I studied.

Q. How late? A. Usually around 10:30 and 11:00 o'clock.

Q. Did you sleep any at all? A. Oh, yes; I sleep some. Gosh, you have to have some sleep. I usually get along with six or seven hours sleep, myself.

[P. 15, lines 3-7]:

Q. You would say you spent between eight and nine hours sleeping and eating? A. Did I say eight and nine?

Mr. Sokol: Sleeping and eating, he said.

The Witness: I would say something like that, probably.

[P. 15, lines 14-25]:

Q. You didn't spend any time at all with either your son or your wife? A. Not too much.

Q. Well, that is a rather ambiguous question in these days of domestic relations. What is too much? How much time would you think, altogether, you spent in the company of either of them on an average? A. Well, that would be a hard question to answer, I would think; because I couldn't say right off just what would be the average.

Q. Are you fond of your son? A. Absolutely. I think a father should be.

[Pp. 16/17, lines 8/1]:

Q. What about staying on Company property: have you had any instructions about that? A. Plenty.

Q. What were they? A. You stick there 24 hours a day, unless it's your days off.

Q. You had two days a week off always until the Southern California area was put on a 48-hour week? A. That is right.

Q. I haven't found anybody that remembers that date. Do you happen to know when that was? A. I believe it was November, '43, wasn't it, that we went on 48 hours?

Q. I can't tell you. It is a matter of public record, but we haven't been able to fix it. A. Sure; November 1, 1943, we went on six days a week.

Q. And you have just gone back on a five-day week? A. We went back to a five-day week.

Q. Very recently, wasn't it? A. The 1st of September, I guess it was.

[Pp. 22/24, lines 20/6] :

Q. In keeping your time cards—you kept your own time cards, didn't you? A. That is right.

Q. Did you keep daily time cards or weekly time cards? A. I keep a weekly time card.

Q. Did you transpose that over to a monthly card? A. It is transposed over to a monthly card, yes.

Q. I know it is; but did you do it, or did some one else do it? A. Some one else does that.

Q. You just turn in a weekly card? A. I turn in a weekly time card.

Q. Now, you showed on that all the overtime that you performed? By that I mean any active duties beyond 7:30 and 4:30? A. Well, I wouldn't say all of it, because a lot of times, maybe, I'll go out for five or ten minutes, and I don't bother with it. So I don't know.

Q. Nobody told you not to bother with it, did they? A. No, they didn't.

Q. I mean that is of your own volition? A. That is my own loss.

Q. What I am getting at is: did you turn in all that you thought was worth while? A. I didn't want to rob the Company, so a lot of times I didn't bother with it. It would be some minor thing.

Q. Have you turned in any overtime that has been disallowed or questioned? A. That was questioned?

Q. Yes. A. No; I never have.

Q. They paid all that you turned in? A. All that I ever put in.

Q. Ever since you've been on that job they've paid you time and a half for it? A. Yes.

Q. And you were paid time and one-half for the sixth day while you were on the 48-hour shift? A. That is right.

[Pp. 25/26, lines 8/14] :

Q. When you came to take it, what, if anything, was said about it that you remember; the substance of what he said about the job? A. Well, he told me that I would work a regular eight-hour day, but I would be stuck there 24 hours a day.

Q. What did he say, if anything, about overtime? A. We would get overtime if I was called out after 4:30.

Q. What did he say about a salary, if anything? A. A salary?

Q. Yes. A. I just forget what my salary was when I started on that. I think it was \$140.00, but I have had several raises since.

Q. Anyway, whatever the amount was, am I correct in saying—I don't want to put words in your mouth, because it is incorrect to do so—that he told you it paid a salary of \$140.00—and it might have been more, but he named some figure—and then you worked eight hours a day, but that you were stuck there for 24 hours a day? A. That is right.

Q. Just when you were relieved? A. That is right.

Q. That you would have to answer any alarms? A. Yes.

Q. And if you were called out after the eight hours, you would get overtime for the actual work? A. That is right.

Q. That is what you understood your compensation would be? A. That's it.

Q. That is correct? A. That is correct.

[Pp. 26/28, lines 18/3]:

By Mr. Sokol:

Q. What eight hours did Mr. Schaefer tell you that you would have to work daily? A. 7:30 to 12:00, and 1:00 to 4:30.

Q. I am not entirely clear with respect to your answer. Did he state that you would get paid while you were waiting to answer an alarm or a call? A. You mean after my eight hours?

Q. After 4:30. A. No, I didn't get paid.

Q. What did he tell you? A. I would only get paid for the eight hours a day. It was 40 hours a week at that time.

Q. Then when you got a call after that, if you went out on it— A. After that I got overtime for it.

Q. You are sure he told you that the hours were 7:30 to 12:00, and from 1:00 to 4:30? A. That is right.

Q. When you go out on a call, do you report to the switching center? A. If it is anything that will interrupt the capacity or the output of the machine, we do, yes.

Q. What I am getting at is: can they tell what overtime you put in? A. Can they tell?

Q. Yes. A. They have no way of telling.

Q. What was that? A. They have no way of telling what overtime I put in, no. I put it on my time card.

Q. I see; but they know what trouble calls have been answered, do they? A. They know what happens, yes.

Q. And what work you do? A. Yes.

Q. And from that they can assume what time it is? A. How long it will take, yes.

[Pp. 33/34, lines 6/3]:

Q. By Mr. Sokol: You make up your weekly time card. Is that correct? A. That is right.

Q. How many hours do you put down daily as time worked? A. Eight hours.

Q. Why do you only put eight hours down? A. Because on top of your time card there we have a space where you enter the time you start and the time you quit.

Q. You only put down, then, from 7:30 a. m. to 4:30 p. m.? A. With one hour out for lunch.

Q. Why don't you put in the time after 4:30 p. m. that you are waiting for these calls? A. Well, that would be overtime, wouldn't it?

Q. There is just a space there for your regular time? A. Well, no; we have a special space there for our overtime, too.

Q. And the reason you don't put that other time down is— A. You wouldn't get any pay for it, if you put in for waiting, overtime for waiting. You've got to show something there that you did.

Q. In accordance with Mr. Schaefer's instructions? A. According to the instructions.

[Pp. 34/35, lines 24/19]:

By Mr. Sterry:

Q. Mr. Rogers, with reference to whether you were paid for these calls or not, as I understand it, when Mr. Schaefer offered you this position—correct me if I am wrong—he told you that there were eight hours' work? A. Eight hours' work, is right.

Q. And that you would be stuck there for 24 hours, except on your days of relief? A. You're supposed to put in eight hours' work, but that you stay there 24.

Q. You would have to stay there where you could answer your alarms and telephones? A. To answer your alarms and telephones.

Q. And for any actual time that you were called out, you would be paid time and a half for it? A. That is right.

Q. That was the arrangement, as you understood it? A. Yes.

Q. And that was the salary or compensation the Company was agreeing to pay you for that character of work. That is correct, isn't it? A. That is the way I understood it.

[Pp. 36/37, lines 18/16]:

Q. What made you think that they wouldn't pay you for any time after your eight hours, except when you were actually answering calls or fixing up trouble? A. Well, they never have paid it. That's the only thing I have to go on.

Q. In other words, you understood it was a job; that you were going up there and work eight hours, and stay there 24, except on your days off, for which they gave you a salary and overtime for any actual work you did. That is what you understood, isn't it? A. That is right.

Q. And that is the way they paid you? A. They paid me for the 40 hours a week; eight hours a day, or 40 hours a week.

Q. And they paid you, as I understand it, for all overtime that you actually put in? A. All overtime that I actually put in.

Q. They paid you for it? A. That is right.

Q. You say that there was some overtime that you thought was so small that you didn't turn it in? A. That is right.

Q. You don't make any claim for that? A. No.
Mr. Sterry: That is all.

(4) HEAD GATE TENDERS.

E. G. EGGERS.

[P. 4, lines 12-15]:

Q. Now, just tell me your duties generally, Mr. Eggers. A. Well, we saddle a horse at 7:30 in the morning, and ride the flume, patrol, clean the screens, and report in the readings.

[P. 4, lines 23-26]:

Q. By Mr. Sterry: Go on. A. We look for leads along the flume on the way down and on the way back, also, and maintain brush clearance on the trail. It takes about three and a half hours to do that.

[Pp. 7/8, lines 24/19]:

Q. Mr. Eggers, you say that you get up at 7:30 in the morning. No; you didn't say you got up; you said you saddled your horse at 7:30, and rode the flumes. Do you have other duties to perform? A. Sure.

Q. What are they? I wish you would tell me just in your own way everything you do. A. Well, it varies. There are times when it takes longer to get over the flume than other times, according to the weather and according to what the headworks is.

Q. I can understand that, but you told us you ride the flume. Now, is just patrolling the flume all you have to do? A. We've got to look for these leaks all the way along.

Q. That is part of your patrolling? A. That is part of the patrolling. We have to clean the right of way, which is part of the patrolling; and it sometimes takes quite a lot of time.

Q. What else besides cleaning the right of way? A. Then there is the maintenance of the ground there in the park. It is inspected quite regularly by the Rangers, and so forth.

[P. 9, lines 7-25]:

Q. I am talking about this job. Are you supposed to do anything? If you see a leak are you supposed to try to fix it, or just simply report it? A. It depends on how bad it is. If I can fix it, why, I do; but it is very seldom in a cement ditch that you can do anything about it without shutting the water off, and that is my part of the job.

Q. What is your part of the job? A. To shut the water off and be there to turn it back on when they are ready.

Q. You haven't told us anything about that. I have been trying to find out what you are required to do. It is part of your job to turn the water off when you know there is a leak. Now, do you turn it off any other time? A. At any time they call me up.

Q. What was that? A. At any time they call me on the telephone.

Q. Who do you mean by "they"? A. Well, the power house operators and the chief.

[Pp. 10/11, lines 7/25]:

Q. You have had that job now a little over a year and four months. How many times have you shut the water off? A. We don't keep track of that. It is in the log of the power house, but I couldn't tell you that.

Q. Can't you give me an idea whether you did it once, ten times or a hundred? A. I don't know how to answer that question.

Q. Well, I am asking you for your best estimate, knowing it may be an estimate, and knowing it may not be accurate without checking the log. I am asking you to give me your best idea how many times you shut that off. A. Probably seven times. I don't know.

Mr. Sterry: What was the answer?

(Record read.)

Q. By Mr. Sterry: Can you describe the operation of shutting that off? A. Well, you unlock the gate and twist it down. That shuts the water off.

Q. How did you twist it down? A. By turning the wheel.

Q. Is there any physical effort required, or is it easy to turn? A. It has to be turned pretty heavy.

Q. And when you open it up you turn it back the other way? A. Yes, sir.

Q. How long would you say it took you to turn it off or shut the gate from the time you got there? A. I think about 12 minutes is the soonest I have ever got it done.

Q. About how long is the longest? A. I didn't hear your question.

Q. About how long is the longest time? A. Oh, 20 minutes, I guess.

Q. And about the same length of time to open it? A. Yes, sir.

Q. You spoke about unlocking it. When you turn it down, do you lock it? A. Yes, sir.

Q. Then you unlock it when you open it? A. Yes, sir. It has a chain between the two wheels. There are two gates.

Q. Are they substantially the same at both dams? A. They are substantially the same at both dams and that wye where the two flumes come together.

[P. 13, lines 3-26]:

Q. And do I understand that down at the wye, where the two come together there is another head gate? A. Yes, sir.

Q. Now, the majority of times you simply closed or opened the gate at the wye? A. Yes, sir.

Q. How many times have you just closed one of the head gates at one or the other of the dams, if at all? A. Well, one of them has only been closed once, and the other one, I think, twice since I have been there.

Q. And the other times you have been opening and closing the gate at the wye? A. Yes, sir.

Q. When you gave your estimate as to your quickest time being 12 minutes and the longest time about 20, you were speaking about the gate at the wye? A. That is right.

Q. Is there any difference in time at the other gates? A. Well, they are about the same.

Q. How long does it take you to get from the house where you live to the gate at the wye? A. Well, it is not quite an hour; about a half hour to get there. To go over there and close the gate and get back, we call it an hour's job.

[P. 14, lines 9-17]:

Q. Ordinarily, when you start out at 7:30 in the morning, when do you get through on one of these patrol trips you have been telling us about? A. It depends on how much trouble I run into.

Q. I appreciate that, but can't you give us an idea of the normal time? A. In a normal time, I am home by noon. In the afternoon we maintain the grounds, and some afternoons we go out and work on the right of way.

[P. 15, lines 6-17]:

Q. How long do you continue working on the grounds or on the right of way? A. Well, a lot of times when you are irrigating there, because of the condition of the grounds, the way it has been happening, sometimes the water isn't shut off until 9:00 o'clock at night. It is a sprinkler system, and has to be watched.

Q. Well, aside from the sprinkler system, what time are you usually supposed to quit? A. 4:30 is when I am supposed to quit. There is no specific time. It is up to me, you know, to maintain the grounds.

[P. 16, lines 15-23]:

Q. Do you ever go to see anybody? A. Not very often. We get permission to leave up there once in a while.

Q. Well, now, you say you get permission. Why do you have to get permission? A. That is the condition of the job. That's the way it was told to me.

Q. Who told you that? A. L. B. Schaefer, the Canyon Chief, at that time.

[Pp. 17/18, lines 2/4]:

Q. Is he the man that employed you for that job? A. Yes, sir.

Q. What did he tell you about it? Tell me, as nearly as you can. I know you couldn't probably give his exact words; but give me the substance of what he told you about it. A. Well, it was to patrol this flume, maintain the right of way so that we could get back and forth on it, and inspect the flume. Of course, being on the repair gang as long as I had, I knew pretty well what was expected of me.

Q. What did he say, if anything, about your not leaving the house? A. Well, he said it was a 24-hour a day job.

Q. What did he say you were going to be paid for the 24-hour a day job? A. \$160.00.

Q. I beg your pardon? A. \$160.00 a month.

Q. Have you been paid that? A. Sir?

Mr. Sterry: Read the question.

(Record read.)

The Witness: Yes, sir.

Q. By Mr. Sterry: Now, did he ever say anything to you about paying you any overtime? A. Yes, sir.

Q. What did he say about that? A. It would be time and one-half.

Q. For what? A. When I was called out at night.

[P. 18, lines 16-20]:

Q. Did you ask for the job, or did they ask you to take it? A. Well, it was partly both. I was asked by one of the other men whether I would like it, and then he approached me.

[P. 20, lines 1-6]:

Q. And as nearly as you can remember, Mr. Schaefer told you it was a 24-hour a day job, and that you were to patrol the flume, keep the right of way clean, and the property up; that you would be paid \$160.00 for that, and you would be paid time and one-half for any work that you did at night? A. That is right.

[P. 20, lines 12-19]:

Q. Do you have a family? A. Yes, sir.

Q. What does it consist of? A. A mother and my wife.

Q. No children? A. No.

Q. They have lived with you? A. Yes.

[P. 21, lines 15-20]:

Q. In making out your time cards, Mr. Eggers, you have had these time cards given to you, haven't you? A. Yes, sir.

Q. Did you make out your own time cards? A. I sign it—I don't remember now—a certain period of time in advance.

[P. 22, lines 9-18]:

Q. Oh, did you keep your own time? A. Yes, sir.

Q. What is the title of your job; headworks tender?
A. That is right.

Q. You make out your own time sheets, don't you?
A. I sign them. That is all.

Q. Who puts in the time showing what you did?
A. Well, the Station Chief.

Q. What does he know as to what you've done? A. Oh, he keeps pretty close track of it.

[Pp. 24/25, lines 16/3]:

Q. I say, you told me a little while ago that you would never put in any claim for overtime for services performed after 4:30 in the afternoon; but have you ever been called out except at night? A. Well, I went out before dark and tended to it, so it would go through the night. Then I have been out several times during the night.

Q. Did you put a claim in for that? A. Yes, sir.

Q. Has it been allowed? A. Yes, sir.

Q. Have you ever put in any claim for overtime that hasn't been allowed? A. No, sir.

[P. 26, lines 7-12]:

Q. Do you patrol the flumes every day? A. It has been a six-day a week. We are on a five-day week now.

Q. What did you say? A. It has been a six-day a week, but now it is a five-day a week starting the first of the month.

[P. 27, lines 5-9]:

Q. Well, now, you said the sixth day was to be time and a half. A. That is the overtime day.

Q. Was that included in your \$160.00? A. No, sir.

[P. 30, lines 17-23]:

By Mr. Sokol:

Q. Since you have on the six-day week you have gotten time and a half on the sixth day. Is that correct? A. That is right.

Q. How many hours; eight or 24 hours on the sixth day? A. Eight hours.

[Pp. 31/33, lines 7/26]:

Q. Will you state whether or not to your knowledge your monthly salary is based upon eight hours of work a day, or 24 hours a day?

Mr. Sterry: Same objection.

Mr. Sokol: Will you answer that?

The Witness: It is based on an eight-hour day.

Q. By Mr. Sokol: However, you said you were on duty 24 hours a day. Is that correct? A. That is right.

Q. What is your normal working day? I understand you start at 7:30 in the morning? A. Yes, sir.

Q. Then you work through to 4:30, was it? A. That is according to the eight hours.

Q. You work through to 4:30. That is your normal working day, is it? A. Yes.

Q. Now, after 4:30, did you do any work on the grounds? A. Yes.

Q. Is that a regular part of your work? A. Well, I have been doing it.

Q. Have you gotten paid for that particular work?

Mr. Sterry: Just one moment. That is objected to as a conclusion of the witness, evading the province of the Court, and one of the issues in this trial.

Q. By Mr. Sokol: If you know of your own knowledge. A. No, it's a pleasure to have the place look nice when you live there.

Q. Just answer the question. My question was: have you been paid, and there was an objection. Have you been paid? A. I have not.

Q. For the time after 4:30? A. No.

Mr. Sterry: Objected to on the grounds stated.

Q. By Mr. Sokol: Now, in addition to maintaining the grounds, have you done other work after 4:30 p. m., for which you claim you have not been paid? A. No.

Q. You stated that you got paid when you got called out at night. A. That is right.

Q. Explain that. A. Well, if the alarm rings, I call the power house and tell them that the bell rang, and they O. K. me to take off and find out what went wrong. Sometimes it would be an hour, sometimes two hours.

Q. Have you any instructions with respect to how much time you can claim? A. No.

Q. Is there any instruction saying that you could claim so much if you only work a half hour or an hour? Is there anything to that effect? A. There never has been a question asked of that kind, because I have worked for the Company long enough, and they trust me to that extent. I never have been questioned about turning in too much time or too little.

Q. When you go out on a call of that kind, after the work is done—I presume that is on the flume. Is that correct? A. That is right.

Q. —After the work is done, do you report back to the station? A. When I get home.

Q. As soon as you get home you report back? A. Yes.

Q. So that they have means of checking on the time you were gone. Is that right? A. That is right.

Q. And for that actual time you get paid time and one-half? A. Yes, sir.

[P. 42, lines 4-9]:

By Mr. Sterry:

Q. Now, Mr. Eggers, just a few questions. Counsel asked you a question and you started to answer it so he cut you off. You started to say something to the effect that it was a pleasure to work on your grounds. I would like you to continue that answer, and tell me what you meant by it.

[P. 42, lines 17-25]:

The Witness: Well, I have some 500 different varieties of roses that were there when I went there, and it is a pleasure to see them continue to be like the other old fellow kept them. Should the Company say to discontinue them, they won't be there.

Q. By Mr. Sterry: In other words, you enjoy keeping the grounds looking nicely? A. I've got to be there, and I do enjoy seeing something taken care of since I've got to be there.

F. E. GRIFFES.

[P. 4, lines 13-25]:

Q. You own that house? A. Yes, sir.

Q. You have lived there for about how long? A. 48 years.

Q. You have owned the property most of that time? A. Well, my father did, and myself.

Q. How long have you been working for the Edison Company? A. I have been there 27 years.

Q. What is your capacity now? In what position are you employed? A. You mean what I work at?

Q. Yes; what is your job called? A. Well, I am a headworks tender and flume walker.

[P. 5, lines 5-7]:

Q. You were living in the same house that you are living in now when you entered the employ of the Company? A. Yes, sir.

[Pp. 11/13, lines 25/18]:

Q. When do you start? A. At 7:30 in the morning.

Q. Are you at the head gate at 7:30, or is that when you leave your house? A. I am at the head gate at 7:30, on the job.

Q. Then, when do you get back to your house? A. Well, it takes six hours, you see; so I don't take no dinner until I get back.

Q. You don't take anything to eat with you? A. No. I just go down and make the trip and back without anything to eat. I don't take out an hour at noon.

Q. You get back about 3:30? A. Yes.

Q. Then what do you do after that during the rest of the day, if anything? A. Well, if there is work to be done, why, I go back and work on the flume.

Q. That is to say, if you have spotted some work on the flume, you will go back? A. Yes.

Q. If there isn't any work on the flume, you haven't anything more to do that day, then? A. No.

Q. Normally, in this time of year and summer time, after 3:30, what do you generally do? A. Well, you see, at 3:30—I get back at 3:30, and I don't take out no noon hour, so—

Q. You eat your lunch? A. I will eat my lunch which takes an hour, and that takes it up.

Q. Then from 4:30 on—By the way, have you a family, Mr. Griffes? A. I have a wife.

Q. Any children? A. No, sir.

Q. Then you do whatever you want to after that? A. In a way, yes.

Q. How far is your residence from the head gate? A. 700 feet.

Q. It takes you about how long to walk? A. Oh—

Q. Normally, I am talking about. A. About 20 minutes.

Q. So you usually leave your house, then, in the morning some time between 7:00 and 7:15? A. Between 7:00 and 7:15.

[Pp. 14/15, lines 23/5]:

Q. Now, in winter time or times of storm, you may have to spend a great deal more time both on walking the flume and keeping the debris off of the screen. Is that correct? A. Yes, sir; that is correct.

Q. Now, if you spend more than eight hours a day at that, you put that overtime in, don't you? A. Yes.

Q. And you get time and a half for it? A. Yes, sir.

[P. 17, lines 2-26]:

Q. Let me ask you during this time that they have been paying overtime, have you ever turned in any that has been rejected? A. No.

Q. You don't send it in in writing; you just call your foreman up and tell him? A. I just call my foreman, and he puts it down.

Q. Do you call him daily, or at the end of each week, or whenever you happen to think about it? A. I turn it in every morning. Like I work at night, I turn it in in the morning.

Q. Before you start to work? A. Yes, sir.

Q. That is to say, yesterday if you worked ten hours, before you start out this morning you would call him up and say, "I spent two hours on overtime"? A. Yes, sir.

Q. Has he asked you for any details of it? A. No.

Q. He just takes that? A. He just takes what I give him.

Q. You say Mr. Schaefer told you to turn in overtime. When did he tell you that, and how? That is, I mean individually, or over the telephone, or by a letter? A. Over the telephone.

[Pp. 18/19, lines 13/14]:

Q. What I am trying to get at, Mr. Griffes, is—now you correct me, if I am wrong—I understood you to say that you take a bunch of these cards and sign them in blank and give them to your foreman? A. Yes, sir.

Q. Then you don't tell him? You never call him up and say, "I spent eight hours." You only call him when you have overtime. Is that correct? A. That is correct.

Q. You will call him up and say, "Yesterday I had so much overtime"? A. Yes. Like I put it in last night, why, I call him up this morning and say, "I put in two hours," or three hours, or four hours, whatever it took.

Q. You would tell him what it was for; that is, cleaning the screen, and so forth? A. Keeping the screen clean, or going out on the flume; or like there comes a break, or anything like that, and I have to go down and shut the water out of the flume.

Q. What I am getting at is: before you were told by Mr. Schaefer to put in overtime, did you just sign these cards up in blank and give them to your foreman? A. Yes.

Q. Then you didn't have anything to tell him about it? A. No.

Q. You just signed them up in blank and handed him a bunch of them, and got your pay check. Is that correct? A. That is correct.

[P. 21, lines 8-19]:

Q. Now, as a matter of fact, you don't have a great many places to go, do you? A. That's it. It takes a long time to get to them places, because they are way back in the mountains.

Q. Is there an auto road from your house to Three Rivers? A. Yes; there is an auto road.

Q. It isn't a paved road? A. There is seven and one-half miles of it that ain't paved.

Q. How long, ordinarily, does it take you to go to Three Rivers? A. Oh, an hour.

[Pp. 21/22, lines 24/4]:

Q. Could you give me an idea of approximately how many times a month you have occasion to leave? That is, regardless of whether you have to call or not, how often it is you want to leave your house? A. Oh, in the condition it is now, it wouldn't be more than maybe once a month, if it is that. That's as near as I can answer you.

[P. 24, lines 4-9]:

Q. Are you called out very often at night, either to clean the screen or tend to the flume? A. During the winter months, I am.

Q. During the summer and fall months you are almost never called out, are you? A. No.

[Pp. 25/26, lines 17/3]:

Q. I understood you at the start to say that you walked the flume three days a week? A. That is right.

Q. What do you do the other two days? A. I cut brush and, as I told you in there, clean lumber piles, and stuff like that. You see, the brush grows over the flume and up against the flume; in other words, the right of way.

Q. Now, you walk the flume three days a week even when you were working six days a week? A. Well, when I worked six days a week, why, that would bring it more

than three times a week, because I walked it every other day.

[Pp. 29/31, lines 1/2]:

Q. Weren't you, all the time you were paid time and a half for the sixth day, also paid time and a half for any night work? A. Yes.

Q. That has been longer than a year, Mr. Griffes. I mean, I think it has. I can't testify. A. Well, that was as near as I could tell.

Q. That is merely your best recollection? A. Yes. That's all I can say. It might have been longer, and it might have been—as near as I can tell.

Q. Now, these days that you don't walk the flume, when you are cutting brush, or lumber, about how many hours do you put in on that? A. Eight hours.

Q. Eight hours? A. That is right.

Cross-Examination

By Mr. Sokol:

Q. Now, when were those eight hours put in? Did you have regular hours? A. Yes.

Q. Every day? A. Every day.

Q. What were those hours? A. 7:30 in the morning until 4:30 at night.

Q. Did anyone tell you that you would have to follow each and every day those particular hours of work? Did Mr. Schaefer tell you that? A. Yes.

Q. All the time that you have been working up there in the last three years, have you followed that routine, 7:30 to noon, and then an hour off for lunch, and from 1:00 to 4:30? A. Yes. Well, as I told you before, when I go over the flume, why, I don't take no lunch with me, and go right through.

Q. You don't take a lunch at noon? A. No.

Mr. Sterry: He just makes a continuous trip.

The Witness: In other words, when I get back I take my hour off for dinner.

Q. By Mr. Sokol: But my question is: do you regularly work from 7:30 a. m. to 4:30 p. m.? A. Yes, regularly.

Q. With an hour off for lunch? A. Yes.

Q. After that time where do you go; to your home? A. Yes.

Q. Do you pay rent to the Company? A. No.

Q. You have your own home? A. I have my own home.

[Pp. 31/32, lines 23/1]:

Q. When do you get paid after your regular shift ends at 4:30 p. m.? When do you get paid for work after that time? A. Whenever I am called out.

Q. Called out from where? A. From home.

[Pp. 35/36, lines 19/2]:

Q. Assume that after 4:30 p. m. there is a call for you to go out. The alarm rings and you have to go out,

and it takes you a half hour. That is all the time you get paid for is that half hour that you spent doing the work on that alarm call? A. Yes.

Q. Otherwise, the time between 4:30 p.m., and the time that the alarm rang, you don't get paid for that?

* * * * *

A. No.

[Pp. 36/37, lines 23/11]:

Q. Did anyone tell you that the only time you would get paid overtime for was the time you actually did work after 4:30 p.m.? A. Yes.

Q. Who told you that? A. The Chief.

Q. The Chief of these plants? A. Yes.

Q. Who is that; Schaefer? A. Yes.

Q. What did he tell you? A. He said any time that I was called after 4:30, why, I get paid time and a half for it.

Q. Just for the time you spent out working? A. Yes.

[P. 38, lines 6-16]:

By Mr. Sterry:

Q. Normally, and after you have finished your patrol of the flume, or after you have finished your work on the cutting of brush around the flume, or lumber piles, you can do anything you please, so long as you can hear the alarm, or stay close enough to hear the alarm in case they need you. Isn't that correct? A. Yes; I guess that would be correct.

Q. You said you weren't free to go and visit anyone. There isn't anyone around there to normally go and visit, is there? A. There is nobody to go and visit.

III.

Average Time Per Day Required to Perform Active Duties as Indicated by Recapitulation of Station Logs and Record of Time Worked [Deft. Exs. B-1-S-6.]

Although the actual time required per operation is undoubtedly much less, we have used the following time allowances for the performance of the indicated operations:

Station Inspection	15 minutes
Reporting to Switching Center	10 minutes
Street Light Switching	15 minutes
Log Entry	5 minutes

ANDERSEN, H. L. CASITAS

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
June 1942	3.03	69.6	Dec. 1942	2.80	64.4
July 1942	2.65	58.3	Jan. 1943	3.13	75.2
Aug. 1942	3.00	66.0	Feb. 1943	2.50	57.4
Sept. 1942	3.03	63.6	Mar. 1943	2.61	62.7
Oct. 1942	2.58	56.7	Apr. 1943	2.84	68.2
Nov. 1942	2.93	61.5	May 1943	2.65	61.0

BOYNTON, H. A. CARDIFF

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Mar. 1942	2.50	52.4	June 1942	4.52	76.8
Apr. 1942	2.41	50.5	July 1942	2.56	33.3
May 1942	2.54	55.8			

DICKERSON, E. K. BEVERLY HILLS

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Mar. 1942	1.49	34.2	May 1942	1.63	37.4
Apr. 1942	1.51	30.1	June 1942	1.30	13.0

EDGERTON, M. M.
BEVERLY HILLS

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Mar. 1942	1.99	21.9	Oct. 1942	1.16	8.1
Apr. 1942	1.30	27.3	Nov. 1942	1.27	27.9
May 1942	2.44	53.6	Dec. 1942	1.17	26.8
June 1942	1.50	37.4	Jan. 1943	1.17	24.5
July 1942	1.15	26.4	Feb. 1943	0.98	19.6
Aug. 1942	1.95	41.0	Mar. 1943	1.20	27.6
Sept. 1942	0.75	6.7			

ELLINGFORD, E. L.
ANITA

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Feb. 1943	1.56	25.0	Apr. 1944	1.35	35.2
Mar. 1943	2.00	46.0	May 1944	1.43	37.3
Apr. 1943	1.74	40.1	June 1944	1.67	25.0
May 1943	1.19	32.0	July 1944	2.24	56.0
June 1943	1.34	33.5	Aug. 1944	1.33	35.9
July 1943	1.70	46.0	Sept. 1944	2.07	53.7
Aug. 1943	1.19	27.4	Oct. 1944	1.41	35.2
Sept. 1943	2.15	55.7	Nov. 1944	1.58	41.0
Oct. 1943	1.27	33.1	Dec. 1944	0.99	26.8
Nov. 1943	1.54	36.9	Jan. 1945	1.25	32.2
Dec. 1943	1.16	25.6	Feb. 1945	1.61	37.1
Jan. 1944	1.75	45.4	Mar. 1945	1.55	41.8
Feb. 1944	1.74	43.6			
Mar. 1944	1.45	37.7			

FRAZIER, CLARENCE R.
TERRA BELLA

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Mar. 1942	0.56	12.8	Sept. 1942	0.55	12.6
Apr. 1942	0.53	10.5	Oct. 1942	0.74	16.3
May 1942	0.84	19.3	Nov. 1942	0.61	12.9
June 1942	1.02	20.4	Dec. 1942	0.75	17.2
July 1942	0.58	7.5	Jan. 1943	0.94	21.5
Aug. 1942	0.58	12.8	Feb. 1943	0.76	16.7

HANLON, P. G.
SOMERSET

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Apr. 1944	1.04	27.1	Oct. 1944	1.27	33.1
May 1944	1.70	44.1	Nov. 1944	1.23	31.9
June 1944	1.45	39.1	Dec. 1944	1.52	39.5
July 1944	1.43	37.2	Jan. 1945	1.30	36.5
Aug. 1944	1.74	46.9	Feb. 1945	1.02	24.4
Sept. 1944	1.41	39.5	Mar. 1945	1.00	26.0

HORNE, O. G.
PEDLEY

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Nov. 1942	0.97	20.3	Feb. 1943	0.73	14.6
Dec. 1942	1.18	27.1	Mar. 1943	0.95	21.8
Jan. 1943	1.96	39.2	Apr. 1943	0.92	20.2

HOSTETLER, W. S.
REDLANDS

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Oct. 1944	2.62	34.1	Apr. 1945	1.60	40.0
Nov. 1944	1.25	32.5	May 1945	1.13	31.7
Dec. 1944	0.98	25.4	June 1945	0.82	20.5
Jan. 1945	1.23	32.1	July 1945	1.46	39.4
Feb. 1945	1.08	26.0	Aug. 1945	1.68	43.7
Mar. 1945	1.85	50.0	Sept. 1945	1.11	26.6

JOHNSON, FRANK
INGLEWOOD

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Apr. 1942	1.84	36.7	Oct. 1942	2.55	56.0
May 1942	2.46	56.6	Nov. 1942	2.35	49.3
June 1942	2.15	42.9	Dec. 1942	2.33	53.5
July 1942	2.32	53.4	Jan. 1943	2.19	39.4
Aug. 1942	2.97	65.4	Feb. 1943	1.75	34.9
Sept. 1942	2.05	36.9	Mar. 1943	1.43	30.0

KANEEN, H. S.
CARPENTERIA

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Mar. 1942	2.56	51.1	Sept. 1942	2.43	51.0
Apr. 1942	2.75	60.5	Oct. 1942	2.35	54.1
May 1942	2.86	65.8	Nov. 1942	2.71	32.5
June 1942	2.80	61.4	Dec. 1942	2.69	61.9
July 1942	2.40	55.2	Jan. 1943	2.36	54.2
Aug. 1942	2.06	45.4	Feb. 1943	2.47	54.3

LARSEN, G. F.
MACNEIL

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Apr. 1943	1.55	18.6	July 1943	1.80	39.7
May 1943	1.63	43.9	Aug. 1943	1.88	48.8
June 1943	2.04	48.9	Sept. 1943	1.35	31.1

MAYES, H. E.
WESTFLOR

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
July 1944	0.95	25.6	Jan. 1945	0.93	24.2
Aug. 1944	0.64	18.5	Feb. 1945	1.64	41.1
Sept. 1944	1.23	31.9	Mar. 1945	1.45	37.8
Oct. 1944	1.52	42.5	Apr. 1945	1.06	27.6
Nov. 1944	1.03	25.8	May 1945	1.10	28.5
Dec. 1944	1.40	37.7	June 1945	0.72	18.7

MOSES, B. E.
MACNEIL

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Jan. 1943	1.76	31.6	Mar. 1943	1.67	38.4
Feb. 1943	2.49	37.4	Apr. 1943	1.53	19.9

STARK, G. W.
GANESHA

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Mar. 1942	3.02	69.5	Sept. 1943	2.10	31.5
Apr. 1942	2.50	50.0	Oct. 1943	1.46	36.6
May 1942	2.60	59.9	Nov. 1943	1.60	40.0
June 1942	2.55	50.9	Dec. 1943	1.19	32.2
July 1942	3.27	75.1	Jan. 1944	1.19	32.1
Aug. 1942	2.08	27.0	Feb. 1944	1.40	34.9
Sept. 1942	2.59	51.7	Mar. 1944	1.30	33.9
Oct. 1942	2.18	50.2	Apr. 1944	1.47	38.2
Nov. 1942	2.26	47.4	May 1944	1.16	31.3
Dec. 1942	1.60	38.4	June 1944	1.41	36.6
Jan. 1943	2.21	46.5	July 1944	0.85	17.0
Feb. 1943	1.04	20.8	Aug. 1944	1.23	27.0
Mar. 1943	1.17	26.8	Sept. 1944	1.42	31.2
Apr. 1943	1.75	36.8	Oct. 1944	1.67	45.0
May 1943	1.09	24.0	Nov. 1944	1.24	31.1
June 1943	1.78	42.6	Dec. 1944	1.01	27.2
July 1943	0.95	19.0	Jan. 1945	1.29	34.8
Aug. 1943	1.82	41.9	Feb. 1945	1.23	29.5

SWEITZER, E. N.
FULLERTON

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Mar. 1942	2.32	53.4	Sept. 1942	2.90	66.7
Apr. 1942	2.37	47.3	Oct. 1942	2.83	68.0
May 1942	2.80	64.3	Nov. 1942	2.35	49.4
June 1942	2.44	24.4	Dec. 1942	2.72	62.6
July 1942	2.42	55.7	Jan. 1943	3.43	75.5
Aug. 1942	2.65	61.0			

TREGONING, A.
BIXBY

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Mar. 1943	1.59	35.0	Sept. 1943	1.32	25.0
Apr. 1943	1.38	31.8	Oct. 1943	1.36	35.3
May 1943	1.64	42.7	Nov. 1943	1.32	34.4
June 1943	1.37	34.2	Dec. 1943	1.21	32.8
July 1943	1.31	34.1	Jan. 1944	1.24	31.1
Aug. 1943	1.30	32.6	Feb. 1944	1.30	32.6

WERT, V. V. B.
CARDIFF

Date	Average Hours Per Day	Total Hours Per Month	Date	Average Hours Per Day	Total Hours Per Month
Sept. 1942	3.42	71.8	Dec. 1942	3.20	70.3
Oct. 1942	3.63	83.4	Jan. 1943	3.51	77.2
Nov. 1942	2.94	64.6	Feb. 1943	3.66	73.2

Range, Average Hours Per Day :

0.53 (Frazier—April, 1942) to

4.52 (Boynton—June, 1942).

Overall Average, Hours Per Day: 1.76.

IV.

The Portal-to-Portal Act Is Constitutional.

So far as we are advised, every court where the constitutionality of the Portal-to-Portal Act has been challenged has upheld it. Because of the number of the District Court decisions we limit our citations to those of the Circuit Court of Appeals. See:

Role v. J. Neils Lumber Co. (C. C. A. 9), 171 F. 2d 706;

Potter v. Kaiser Co (C. C. A. 9), 171 F. 2d 705;

Battaglia v. General Motors Corp. (C. C. A. 2), 169 F. 2d 254, Cert. den. 335 U. S. 887;

Fisch v. General Motors Corp. (C. C. A. 6), 169 F. 2d 266, Cert. den. 335 U. S. 902;

Seese v. Bethlehem Steel Co. (C. C. A. 4), 168 F. 2d 58;

Rogers Cartage Co. v. Reynolds (C. C. A. 6), 166 F. 2d 317;

Darr v. Mutual Life Ins. Co. (C. C. A. 2), 169 F. 2d 262 (cited in brief), Cert. den. 335 U. S. 871;

McDaniel v. Brown & Root (C. C. A. 10), 172 F. 2d 466;

Lasater v. Hercules Powder Co. (C. C. A. 6), 171 F. 2d 263.

The foregoing decisions have upheld the constitutionality of the Act upon one or more of the following established principles of constitutional law:

(1) A right given by statute before it has been reduced to final judgment may be modified or abolished by amendment or repeal of the statute. See:

Western Union T. Co. v. Louisville & N. R. Co.,
258 U. S. 13, 20;

Kline v. Burke Constr. Co., 260 U. S. 226, 234;

*National Carloading Corp. v. Phoenix-El Paso Exp.
Inc.* (Tex.), 176 S. W. 2d 564, 567-580, Cert.
den. 322 U. S. 747;

U. S. ex rel. Rodriguez v. Weekly Publications
(C. C. A. 2), 144 F. 2d 186, 188;

City of Phoenix v. Drinkwater (Ariz.), 52 P. 2d
1175, 1177, 1178;

Fleming v. Rhodes, 331 U. S. 100, 107;

Pearsall v. Great No. R. Co., 161 U. S. 646, 673,
674;

Ewell v. Daggs, 108 U. S. 143, 151.

The rights given by the Fair Labor Standards Act were rights created by statute. See:

Culver v. Bell & Loffland (C. C. A. 9), 146 F. 2d
29, 31;

*Missell v. Overnight Motor Transportation Co.,
Inc.* (C. C. A. 4), 126 F. 2d 98, 100;

*Tennessee Coal, Iron & Railroad Company v. Mus-
coda Local No. 123, etc.*, 321 U. S. 590, 602;

Brooklyn Savings Bank v. O'Neil, 324 U. S. 697,
704-5, 708, 710-11;

Schulte v. Gangi, 328 U. S. 108, 115-6;

Asselta v. 149 Madison Avenue Corporation, 65
Fed. Supp. 385, 387-8;

149 Madison Avenue Corporation v. Asselta, 331
U. S. 199.

(2) If, on any theory, it can be held that the rights plaintiffs attempt to assert are contractual in whole or in part, such rights affecting and interfering with congressional control over commerce can be modified, impaired or abolished by Congress. See:

Louisville & Nashville Railroad Co. v. Mottley, 219 U. S. 467, 476, 480-1, 482-3;

Norman v. Baltimore & O. R. Co., 294 U. S. 240, 302, 307-311, 316;

Addyson Pipe & Steel Co. v. U. S., 175 U. S. 211, 226-229;

Legal Tender Cases (Knox v. Lee, Parker v. Davis), 12 Wall. 457, 550-1;

State of New York v. United States, 257 U. S. 591, 600-601;

Gelfert v. National City Bank of New York, 313 U. S. 221-231;

Fleming v. Rhodes, 331 U. S. 100;

Philadelphia etc. Railway Co. v. Schubert, 224 U. S. 603, 613-4.

V.

The District Courts of the United States, Being Courts of Limited Jurisdiction, Cannot Proceed Unless at All Times the Record Discloses Jurisdiction. Where It Affirmatively Appears That the Court Is Without Jurisdiction, It Is the Duty of the Court to Dismiss the Action of Its Own Motion Whether the Point Has Been Raised by the Parties or Not.

“ . . . The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. *He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing* . . . If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence. We think that only in this way may the practice of the District Courts be harmonized with the true intent of the statute which clothes them with adequate authority and imposes upon them a correlative duty.”

McNutt v. General Motors Accept. Corp. (cited in our brief), 298 U. S. 178, 189.

See, also, to the effect that it is the duty of the Federal Court to dismiss of its own motion wherever the lack of its jurisdiction comes to its attention:

Fisch v. General Motors Corporation, Bateman v. Ford Motor Co. (C. C. A. 6th, 1948), 169 F. 2d 266, Cert. den. 335 U. S. 902;

United States of America v. Corrick, 298 U. S. 435;

Ellenwood v. Marietta Chair Co. (1895), 158 U. S. 105;

North Pacific SS Co. v. Soley, 257 U. S. 216;

Erickson v. Pac. Greyhound Lines (D. C. Cal.), 56 Fed. Supp. 938;

Industrial Union of Marine and Shipbuilding Workers v. New York Shipbuilding Corporation (D. C. N. J., 1948), 79 Fed. Supp. 104, 106;

Torquay Corp. v. Radio Corp. of America (D. C. N. Y., 1932), 2 Fed. Supp. 841, 844;

Kvos, Inc., v. Associated Press, 299 U. S. 269, 278-80;

Frank W. Clark v. Paul Gray, Inc., 306 U. S. 583.

“United States District Courts are courts of limited jurisdiction. Creatures of statute, they have only such jurisdiction as the statutes expressly confer, and this jurisdiction must always affirmatively appear . . . Whenever the question of jurisdiction of the federal District Court is presented, it will be presumed that the court is without jurisdiction unless the contrary affirmatively appears.”

Le Mieux Bros. Inc. v. Tremont Lumber Co. (C. C. A. 5), 140 F. 2d 387, 389.

VI.

The Portal-to-Portal Act Is Not Limited to So-called Portal or Preliminary or Postliminary Activities.

So far as we are advised, the contentions which the appellants advance in this case that, contrary to the clear language of the Act, it was intended to be limited to so-called portal activities, have not been passed on by any Court of Appeals. It has been presented a number of times to the District Courts and, wherever so presented, rejected.

In *Seese v. Bethlehem Steel Company*, 74 Fed. Supp. 412, 416, Judge Chestnut, in dismissing a suit brought prior to the Portal-to-Portal Act, said, in part:

“ . . . It will be noted that the Act in this respect is not limited to portal-to-portal activities as such but defines the essential characteristics of any alleged liability for non-payment of minimum wages or overtime compensation. *None* are to be compensable ‘except an activity which was compensable by either —’ contract, custom or practice. Furthermore, while the language includes the word ‘except,’ it seems entirely clear from the whole wording that the *exception is the only activity which is compensable*. Therefore the complaint is legally sufficient only when it alleges activities that are compensable under the Fair Labor Standards Act as amended by the Portal-to-Portal Act. Conversely, the complaint does not state a legal liability unless it alleges compensable activities.” (Emphasis by the Court.)

Seese v. Bethlehem Steel Co., 74 Fed. Supp. 412, 416.

The decision of the Court was affirmed by the Fourth Circuit Court of Appeals in *Seese v. Bethlehem Steel Company*, 168 F. 2d 58, but this point which we are now considering was ignored by the appellate court.

In *Boerkoel v. Hayes Mfg. Corporation*, 76 Fed. Supp. 771, 775, the District Court of Michigan said:

“Plaintiff contends that section 2 of the Portal-to-Portal Act is not applicable because his suit is not based on strictly portal-to-portal activities, that is, activities preliminary or postliminary to his principal activities. However, this contention ignores the plain wording of that section, which covers all activities and claims arising prior to the passage of the Act and determines the compensability of all activities during an employee’s day.”

Boerkoel v. Hayes Mfg. Corp., 76 Fed. Supp. 771, 775.

In *Bauler v. Pressed Steel Car Co., Inc.*, 15 Labor Cases, Par. 64,569, p. 73,743, the Federal District Court of Illinois in granting leave to plaintiffs to amend their complaint after the effective date of the Portal Act, said in part:

“The plaintiffs contend that this is not a ‘portal’ action because they performed guard duties on the way to their regular posts, such as checking for violations of fire regulations and stopping employees not having identification badges. *But the Portal-to-Portal Act applies to all actions under the Fair Labor Standards Act.* The issue therefore, whether or not this is a ‘portal’ action, *is whether the overtime sued for here is for an activity compensable by contract, custom or practice.*”

Plaintiffs' motion to file an amended complaint to allege the substantive and jurisdictional requirements of the Portal Act was granted in part (81 Fed. Supp. 172).

Bauler v. Pressed Steel Car Co., Inc., 15 Labor Cases, Par. 64,569, p. 73,747, p. 73,748.

See, also, to the same effect:

Shaievitz v. Laks (D. C. N. Y.), 80 Fed. Supp. 241;

Bateman v. Ford Motor Company (D. C. Mich.), 14 Labor Cases, Par. 64,353, p. 72,901, Affd. C. C. A. 6), 169 F. 2d 266, Cert. den. 335 U. S. 902;

Kemp v. Day & Zimmerman (Iowa), 33 N. W. 2d 569.

VII.

A Contract of Employment Containing a Provision Similar to Bulletin A-36 That the Employees Would Be Paid a Definite Hourly Wage or a Specific Weekly or Monthly Salary and Time and a Half for Work in Excess of Forty Hours Per Week Is Not Sufficient to Meet the Requirements of the Portal Act, in That It Does Not Specify the Particular Activities That Are to Be Paid for and That Under the Portal Act It Is Necessary to Expressly Promise to Pay for the Particular Activities for Which Compensation Is Sought.

In *Kemp v. Day & Zimmerman, Inc.* (not yet officially reported—Iowa), 33 N. W. 2d 569, 577-8, defendant was engaged in the manufacture of munitions for the Federal Government. Plaintiffs were employed at a specific hourly rate, with no overtime compensation, defendant believing they were exempt from the provisions of the original statute. After severing their connection with defendant and before the passage of the Portal Act, plaintiffs instituted suit to recover overtime compensation, liquidated damages and attorney's fees. The case coming on for trial shortly after the effective date of the Portal Act, defendant moved for a continuance, which was denied. Judgment being rendered for plaintiffs, defendant after the effective date of the Portal Act, moved for a new trial, which was likewise denied.

The Supreme Court of Iowa reversed the case, saying, in part:

"The only basis of the claims which we find in the printed or certified record is a statement in paragraph one of the resistance to defendant's motion to vacate the judgments and for new trial, viz.: '* * * that all of the plaintiffs in the consolidated actions

sought and are seeking therein to recover for overtime work during the ordinary working day while in the employment of the defendant, *such work being compensable as overtime by custom and practice in effect at the time of such employment and service.* (Italics supplied.) There is no evidence even tending to support or sustain the italicized statement. The plaintiffs, of course, were employed by defendant. Whether it was by written or verbal contracts does not appear. But the fact that there may have been contracts of employment is not sufficient to sustain recovery in this action. To aid the plaintiffs such contracts, if any, *must each have contained an express provision that the defendant agreed to pay the employee compensation for the overtime alleged to be due him.* No contract containing any such express provision is claimed, alleged or proved by any plaintiff. The court made no such finding."

As to the constitutionality of the Act, followed by a consideration of the applicability of the statute to the instant case, the court continued:

"We have set out the extent of the combined arguments on the point. Neither side has cited any decision or authority. Each relies upon the language of the statute. It is clear and unambiguous. *Just two essentials for compensability are stated—an express provision of a contract, or a custom or practice.* They are the requisites of both section 2(a), subsections (1) and (2), and of section 2(b). *Everything else is eliminated.* The kinds of activities are not designated or delimited. But to be compensable or within the jurisdiction of the court, the requirements of section (a) and (b) must be met. Even if the activity be 'work done within the workday proper,' as plaintiffs assert was the case, it must be 'under

such contract provision or such custom or practice.’
It is so stated in section 2(b).”

* * * * *

“The Portal-to-Portal Act makes an express provision in a contract, in effect during the overtime, or a custom or practice in effect at said time the *sine qua non* of recovery, without regard to the nature of the overtime activity. *An implied contract or one in contemplation of law does not comply with the Act.*”

Kemp v. Day & Zimmerman, Inc. (Iowa, 1948),
33 N. W. 2d 569, 577-578, 590, 591.

Sadler v. W. S. Dickey Clay Mfg. Co. (D. C. Mo.),
78 Fed. Supp. 616. Action was instituted prior to the Portal Act for preliminary and postliminary activities. After the effective date of the Portal Act, motion to dismiss was granted with leave to amend, and plaintiffs filed an amendment substantially similar to the third amended complaint in the instant cases, wherein it was alleged in the language of the Portal Act that the activities were compensable by an express provision of a contract and by custom and practice, without specifying or setting out the provisions of the alleged contract or the facts constituting the alleged custom and practice.

In dismissing the complaint the court, in part, said:

“ . . . It seems manifest from the method adopted by Congress in so delimiting the jurisdiction of courts to hear and determine claims arising under the Fair Labor Standards Act, as amended, that Congress intended *that before an employee could invoke the*

jurisdiction of the courts in the enforcement of such claims, the employee should affirmatively and distinctly establish by facts his right to maintain such action and the jurisdiction of the court thereover.

. . . The general allegations contained in the amended complaint do not comport with the intent and purpose of such order. Under the established rule, that a plaintiff suing in a Federal Court must show in his petition, affirmatively and distinctly, the existence of whatever is essential to Federal Jurisdiction, we believe that under Section 2(d), *supra*, of the Portal-to-Portal Act of 1947, plaintiffs, relying upon a contract, *must allege the express provision of such contract that would authorize the payment of compensation for the particular activity claimed; or if relying upon a custom, that he should allege facts from which the custom or practice may be inferred that would make such activities compensable.*"

Sadler v. W. S. Dickey Clay Mfg. Co. (D. C. Mo.), 78 Fed. Supp. 616, 618.

In *Plummer v. Minn., etc., Co.* (D. C. Minn.), 76 Fed. Supp. 745 (cited and quoted from in our brief), plaintiffs were guards at defendant's plant during the war and seek recovery for time spent walking to and from their posts of duty, cleaning their firearms, changing clothes, etc. Defendant moved for summary judgment on the grounds that defendant conclusively showed that the action did not fall within the exceptions noted in the Portal Act, *i. e.*, there was no express contract or custom or practice to compensate plaintiffs for the type of activity for which

compensation was sought. Plaintiffs claimed that their activities sued for were made compensable by reason of the fact that they had been told they would be paid for all work at a definite hourly rate. In rendering summary judgment for the defendant the court, in part, said:

“The only response which plaintiffs make to the showing that there was no express provision of any written or non-written contract which would sustain their right of recovery under the Portal-to-Portal Act is to state that when these men were hired they were told they would receive so many cents per hour for all work performed. Clearly, such a showing, in view of the type of activities alleged to have been performed, would not sustain recovery under the Act. *It is conceded that the parties did not agree in the employment contract that the services enumerated were to be compensable.* Plaintiffs worked at defendant’s plant for some three years and were paid for the straight time and overtime that they worked as guards pursuant to any individual contract of employment or any collective bargaining contract. It was some months after their employment terminated that they first made a claim for compensation by reason of the specific services enumerated above. In order to sustain a recovery under the Portal-to-Portal Act, plaintiffs must establish an express provision in a written or non-written contract between the parties to the effect that plaintiffs were to be compensated for these specific services. The claimed basis for their recovery herein as indicated by this showing is the very situation which apparently motivated Congress in passing the legislation now commonly referred to as the Portal-to-Portal Act. *It seems elementary that the conditions of that Act are not met by the implied contract claimed to be based*

on the general employment contract which is set forth in plaintiffs' affidavit."

Plummer v. Minn., etc. (D. C. Minn.), 76 Fed. Supp. 745, 746.

Colvard v. Southern Wood Preserving Co. (D. C. Tenn.), 74 Fed. Supp. 804, plaintiffs claimed overtime for time spent traveling to and from the place of work on the employer's premises and in changing clothes, obtaining and replacing tools, etc. On motions by both plaintiffs and defendants for summary judgment.

Plaintiffs contended that a provision in the employment contract to the effect that they would receive time and one-half for overtime constituted an express contract coming within the exception of Section 2 of the Portal Act.

In denying this contention and rendering judgment for defendant, the court said:

"[2] My judgment is that the contract for the payment of overtime, as intended by the Congress in the Portal-to-Portal Act of 1947, must be an express or written contract *concerning the particular time for which overtime compensation is sought.* I think the general provision in the employment contract to pay time and one-half for overtime has no significance in determining the number of hours in a work week. This would be true had there been no Portal-to-Portal Act of 1947."

Colvard v. Southern Wood Preserving Co. (D. C. Tenn.), 74 Fed. Supp. 804, 805.

Finn, et al. v. Bethlehem Steel Company (D. C. Mass.), 15 Labor Cases, Para. 64,592, p. 73,847—Action for overtime compensation for preliminary and postliminary activities. In holding that the action would be dismissed failing a proper amendment, the Court stated:

“In the above case the plaintiff has filed a motion to amend his cause of action and, after detailing certain work which the employees performed for a fifteen-minute period just prior to the commencement of production and other work at the defendant’s plant states as a conclusion that ‘. . . these aforementioned activities were compensable by the express provisions of contracts of employment . . .’. The plaintiff has been allowed to amend his complaint to show the jurisdiction of this Court. Merely suggesting that the activities for which compensation is sought were compensable by the express provisions of a contract of employment is not sufficient to show the jurisdiction of this Court. The plaintiffs in this case are numerous, and the records of the defendant must be subject to much search and scrutiny by both parties before trial. It is therefore quite essential that jurisdiction should be clearly established before proceeding with such a vast task. *It cannot be established by tortuous reasoning as to the construction of a contract. The statute calls for a clear and express provision of a contract making the time for which compensation is sought compensable in fact and in law.*

“Having in mind the provisions of Rule 8(a) of the Federal Rules of Civil Procedure and the previous

decision in this case, *and in the absence of a specification of the express provision of the contract relied upon, the action must be dismissed.* If such a provision can be set forth in its own language, the plaintiff will have ten days in which to move to amend. Otherwise, the motion to dismiss is allowed.” (P. 73,847.)

Finn, et al. v. Bethlehem Steel Company (D. C. Mass., 1948), 15 Labor Cases, Para. 64,592, p. 73,847.

Smith v. Cudahy Packing Co. (D. C. Minn.), 76 Fed. Supp. 575, appeal dismissed 172 F. 2d 223, was an action to recover compensation for time spent changing clothes and engaging in duties preparatory to commencing and after concluding work. The action was filed prior to the enactment of the Portal Act.

After the enactment of the Portal Act, defendants moved in the alternative for dismissal or for summary judgment, and supported the motions by affidavits, on the grounds of (1) lack of jurisdiction over the subject matter, and (2) failure to state a cause of action.

Plaintiffs then amended their complaint so as to allege that the activities for which compensation was sought were compensable by contract and by custom or practice.

The supporting affidavits of the defendants were to the effect that there was no custom or practice to pay for the activities involved, and further that there was no contract between the parties to do so, and that a collective bargaining agreement in existence at the time had been complied with.

Plaintiffs' affidavits in each case were to the effect that there was a contract as well as a custom and practice to pay for the activity. Plaintiffs argued that a trial of 1700 claims might establish that they are cognizable even in the face of the Portal Act.

In granting defendants' motion for summary judgment the Court said:

"The amendment to the complaints, consisting of a general allegation that the compensation here sued for was based on 'express provisions of nonwritten or written contracts in effect at the time such work activities were performed by plaintiffs herein, and that such work activities were compensable by custom or practice' in my opinion is not sufficient to avoid the very specific prohibition of the Portal Act. The affidavits furnished by plaintiffs do not add what the complaints lack in plaintiffs' cases, so as to circumvent what Congress clearly withdraws."

* * * * *

"The record now before the Court is such that the question of jurisdiction can be determined on the motion for summary judgment."

Smith v. Cudahy Packing Co. (D. C. Minn.), 76 Fed. Sup. 575, 579, 581, appeal dismissed 172 F. 2d 223.

VIII.

The Requirement of the Defendant That Its Primary Servicemen After the End of Their Shift Should Always Advise It Where They Could Be Reached by Telephone in Case Their Services Were Needed Did Not Entitle Them to Overtime Compensation.

In *Dumas v. King* (C. C. A. 8th), 157 F. 2d 463, plaintiff was a stationary engineer in defendant's plant. He sued for overtime compensation. It seems to have been conceded that he put in more than forty hours a week at the plant, but defendant claimed that the plaintiff was an executive. The District Court found to the contrary and allowed him overtime compensation and liquidated damages for the amount of time which the court found plaintiff had worked in excess of forty hours per week at defendant's plant, but denied recovery for time after plaintiff left the plant, plaintiff's claim being that after he left the plant he was required to remain in telephone touch with defendant in order to respond in case of an emergency. The defendant appealed and plaintiff cross-appealed. The judgment was affirmed. In denying the cross-appeal the court said in part:

“Nor does the contention merit serious consideration that the court as a matter of fact should have held that King was on duty 24 hours a day, because it had been agreed that he might be called to the plant from his home at any time, if something went wrong with the machinery. The evidence shows that he was free to go where and do what he pleased during this alleged waiting time, and that he did so, only advising the plant where it would be possible to reach him in case of an emergency.

“The Supreme Court said in *Skidmore v. Swift & Co.*, 323 U. S. 134, 136, 137, 140, 65 S. Ct. 161, 163, 164, 89 L. Ed. 124: ‘We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. * * * This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. * * * Each case must stand on its own facts.’

“In the present case, the trial court plainly was warranted in finding that King was not ‘engaged to wait’ after he left the plant, but that he merely ‘waited to be engaged.’ ”

Dumas v. King (C. C. A. 8th), 157 F. 2d 463, 466.

In *Super-Cold Southwest Co. v. McBride* (C. C. A. 5th), 124 F. 2d 90, judgment was given for the plaintiff for overtime compensation and liquidated damages and attorney’s fees. On appeal the plaintiff sought reversal on the grounds: (1) It was a retail establishment exempt under the act; (2) that the plaintiff’s evidence showed he was engaged in both interstate and intrastate commerce and the evidence did not show what part of his overtime work was in interstate commerce; (3) so much of the judgment as allowed for overtime for “on call” time on Sunday

was erroneous. The appellate court denied the first contention and sustained the last two, saying as to the third:

“It was error to allow plaintiff for the time set up in his Exhibit A, as ‘Sundays on call’ without further explanation, a recovery for 12 hours overtime each day. Putting aside the unreasonableness of the claim that because he was ‘on call’ on Sunday he was ‘at work’ for 12 hours, when eight hours was his work day, we think it clear, that the mere statement that he was ‘on call’ without more, in the face of the record which shows that a person ‘on call’ merely had to leave his telephone number or place where he could be found, is not proof that he was engaged in work either regular or overtime within the meaning of the Fair Labor Standards Act. For the failure of the proof in these respects, the judgment is reversed and the cause is remanded with directions to ascertain and allow plaintiff for, the amount of actual overtime he worked in interstate commerce including therein all time worked in such commerce whether on Sunday or any other day *and excluding therefrom all time claimed when the claim is merely for being ‘on call’ without more.*”

Super-Cold Southwest Co. v. McBride (C. C. A. 5th), 124 F. 2d 90, 92.

In *Barker v. Georgia Power & Light Co.* (D. C. Ga., 1942), 2 WH Cases 486, the district court for Georgia, in denying plaintiff’s overtime compensation for on-call time, said:

“The time after the regular work-day during which plaintiffs were available and ‘on call’ in the event of trouble or an emergency, was not hours worked, and plaintiffs are not entitled to compensation for such time spent ‘on call’ when no actual work was per-

formed by them. This finding is supported by the three agreements entered into in 1939, 1940 and 1941 between the defendant and the local union, to which the plaintiffs belonged, and which will be hereinafter referred to more in detail, which agreements provide that 'hours worked' should include time actually at work or on duty, including the time required to stand-by prepared to go to work at a specific place. It is also supported by paragraph eight of Interpretative Bulletin No. 13, issued by the Office of the Administrator of the Wage and Hour Division on July 1, 1939 [1942 WH Man. 123] * * *"

* * * * *

"The time during which plaintiffs were only 'on call' and not on duty performing actual work for defendant, or standing by prepared to go to work at some specific place, is not hours worked and none of the plaintiffs are entitled to recover any sum as compensation for time spent 'on call.'

"The method used by defendant in calculating the compensation due plaintiffs for regular and overtime work was correct and in accordance with the several agreements entered into between defendant and Local Union No. 511 of the International Brotherhood of Electrical Workers, and also in accordance with the Fair Labor Standards Act of 1938."

Barker v. Georgia Power & Light Co. (D. C., Ga., 1942), 2 WH Cases 486, 489, 494.

See to same effect:

Bohn v. B. & B. Ice and Coal Co. (D. C., Ky., 1946), 63 Fed. Supp. 1020;

Allen v. Arizona Power Corporation (D. C., Ariz., 1944), 8 Labor Cases, Par. 62,024. p. 65,862;

Thompson v. Loring Oil Co. (D. C., La., 1943), 50 Fed. Supp. 213.

IX.

If It Be Assumed That the Agreement of the Appellants' Employment Was a Violation of the Fair Labor Standards Act Prior to the Portal Act, the Contract of Employment Was Made Valid by the Portal Act.

In *Lasater v. Hercules Powder Co.* (C. C. A. 6,), 171 F. 2d 263, 265, the Sixth Circuit Court of Appeals in affirming judgment for the defendant, said:

“ . . . With regard to the contention of appellants that the Fair Labor Standards Act should be read into the contract of employment, it was said in *Seese v. Bethlehem Steel Co.*, 4 Cir., 168 F. (2d) 58, 65, [14 Labor Cases, Par. 64,515] where a similar argument was made, that ‘the true situation with respect to claims affected by the Portal-to-Portal Act is that that act validates the real contract between the parties and merely takes away a statutory remedy given by the prior act. Even if the provisions of the Fair Labor Standards Act be read into contracts of employment, so also must be read the constitutional power of Congress to change that Act.’ The provisions of the Portal-to-Portal Act, striking down claims for overtime not based on contract, custom, or practice, are valid, and appellants, accordingly, in this case are not entitled to such compensation for overtime.”

Lasater v. Hercules Powder Co. (C. C. A. 6), 171 F. 2d 263, 265.

See, also:

Seese v. Bethlehem Steel Co. (C. C. A. 4), 168 F. 2d 58, 65;

Role v. J. Neils Lumber Co. (D. C., Mont.), 74 Fed. Supp. 812, 814, Aff. (C. C. A. 9) 171 F. 2d 706;

McNair v. Knott, 302 U. S. 369, 372-4;

Read v. Plattsmouth, 107 U. S. 568;

Watson v. Mercer, 8 Pet. 88, 111.

X.

Even Before the Portal Act, Where the Employment Was Such That It Was Difficult to Determine the Actual Amount of Work Performed, the Agreement of the Parties as to What Constituted Compensable Time Was Recognized and Upheld by the Courts, Provided It Was a Reasonable Agreement and Entered Into by the Parties in Good Faith.

Bowers v. Remington Rand, Inc. (C. C. A., 7th), 159 F. 2d 114, 116-117 (Cert. den.), 330 U. S. 843, is perhaps the closest factually to the instant situation. It was an action for overtime brought by defendant's employees under the act.

Plaintiffs were firemen employed by the defendant and worked under the "two-platoon" system. Under this system employees were required to remain within the plant area for 24 consecutive hours on alternate days. They were paid for 16 hours and during the remaining 8 they were free to sleep in facilities provided by defendant. Overtime was paid if the firemen were called to work during these 8 hours, but these calls were infrequent (105 hours out of 78,655). No restraints were placed upon the liberty or normal pursuits of the men during the 8-hour period other than that they sleep in the plant subject to call for emergency. During the 16-hour period the men engaged in various activities such as cleaning the station and equipment, attending classes, drills, etc.

"Upon these facts the court concluded that appellants and appellee had entered into a contract of employment under which appellants agreed to sleep at the plant subject to call, and that the sleeping period did not constitute working time" (p. 116).

From a judgment in favor of defendant plaintiffs appealed. In affirming the Court said (pp. 116-117):

“To be sure, agreements which violate the provisions or purposes of the Act will not be given effect. That rule is now settled; *that rule, however does not apply to an agreement to settle the question whether certain activity or non-activity constitutes work or employment.*

* * * * *

“Appellants, relying on the case of *Armour & Co. v. Wantock*, 323 U. S. 126, at page 133, 65 S. Ct. 165, at page 168, 89 L. Ed. 118, in which the court said, that ‘* * * an employer * * * may hire a man to do nothing * * * but wait for something to happen,’ and on *Skidmore v. Swift & Co.*, 323 U. S. 134, 65 S. Ct. 161, 89 L. Ed. 124, in which the court in effect said that ‘waiting time’ may be working time, argue that they were on a 24 hour shift, restricted to fire stations or within hailing distance thereof, and wholly under the control and direction of appellee. They assert that they are entitled to compensation for their sleeping time solely because they remained at the plant subject to call or service in case of emergencies. In other words, what appellants in effect seek, is that the court make a new contract for the parties.

“After the close of all the evidence the trial court said: ‘Whether time may be compensable depends on circumstances of the case, and the mere fact that the employee was in some small degree deprived of some freedom of action doesn’t alone determine the question. The firemen were willing to keep themselves available for duty if called upon during their rest period, they were willing in consideration of their

employment as firemen to sleep on the premises * * *
With this statement we agree, since the facts show that appellants agreed to wait to be engaged, *Skidmore v. Swift & Co.*, *supra*, 323 U. S. 137, 65 S. Ct. 161, 89 L. Ed. 124; hence the time spent in sleeping is not compensable. See also *Rokey v. Day & Zimmerman*, 8 Cir., 157 F. 2d 734.”

Bowers v. Remington Rand, Inc. (C. C. A. 7th, 1946), 159 F. 2d 114, 116-117, Cert. den. 330 U. S. 843, 91 L. Ed. 1288.

Walling v. A. H. Belo Corp., 316 U. S. 624, 630-635, was on writ of certiorari to the Fifth Circuit Court of Appeals to review a judgment affirming a judgment of the District Court entering a declaratory judgment construing the FLSA and denying injunctive relief against an alleged violation. This case established the famed “Belo Doctrine” applying the term “regular rate” of the Act. No question as to what constituted working time was involved, but the Court said (pp. 630, 634):

“But nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act.

* * * * *

“The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of ‘regular rate’ when Congress has failed to provide one. Presumably Congress refrained from

attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable. And that which it was unwise for Congress to do, this Court should not do. *When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours.*"

Walling v. A. H. Belo Corp., 316 U. S. 624, 630, 634-635.

See also to same effect:

Tennessee C. I. & R. Co. v. Muscoda Local 123, 321 U. S. 590, 603;

Skidmore v. Swift & Company, 323 U. S. 134, 136-137 (cited in brief);

Jewell Ridge Coal Corporation v. Local 6167, 325 U. S. 161, 169-170.

XI.

Where a Contract Is Susceptible of Two Constructions, One of Which Makes It Fair and Reasonable While the Other Makes It Inequitable, Unusual, or Such as Reasonable Men Would Not Be Likely to Enter Into, the Latter Construction Must Be Disregarded and the Former Accepted.

In *Pressed Steel Car Co. v. Eastern Ry. Co. of Minnesota* (C. C. A. 8), 121 Fed. 609, 611, the Eighth Circuit Court of Appeals, in reversing judgment for the plaintiff, said, in part:

“Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair, or improbable contract.”

Pressed Steel Car Co. v. Eastern Ry. Co. of Minnesota (C. C. A. 8), 121 Fed. 609, 611.

In *Cohn v. Cohn*, 20 Cal. 2d 65, 70, the will of Charles Cohn devised and bequeathed four-fifths of his estate to Levi Cohn, his brother, and one-fifth to the appellants who were other brothers and sisters, or children of deceased brothers and sisters. Probate of the will was contested by the appellants. Thereafter, a contract was en-

tered into between the appellants and Levi Cohn whereby forty-five per cent of the estate available for distribution was to be distributed to Levi Cohn and fifty-five per cent to the appellants. The contest was then withdrawn and the will admitted to probate. All inheritance and estate taxes were paid. A dispute arose between the appellants and Levi Cohn as to the allocation of taxes, appellants claiming they should be charged with an inheritance tax only on the one-fifth of the estate left to them. The Superior Court held they were entitled to fifty-five per cent of the estate remaining after all expenses of administration and inheritance taxes had been paid. In affirming judgment, the Supreme Court said (at p. 70):

“Another factor which is entitled to consideration in construing the agreement is that if the contention of the appellants were correct and \$94,886 of the tax is deducted from the interest of Levi Cohn under the will, the respondent will receive only about 30 per cent of the estate, based upon a market value of \$650,000. On the other hand, if the entire tax is deducted from the value of the estate before it is apportioned among the heirs, the respondent will receive 45 per cent of the amount ‘available for distribution.’ *Where one construction would make a contract unreasonable or unfair, and another construction, equally consistent with the language, would make it reasonable, fair and just, the latter construction is the one which must be adopted.*”

Cohn v. Cohn, 20 Cal. 2d 65, 70.

In *Stoddart v. Golden*, 179 Cal. 663, 665, suit was brought to foreclose a mortgage securing a promissory note which provided for payments in installments of "\$1000.00 on or before October 27, 1912, with interest at the rate of 7% per annum, payable at maturity; the sum of \$2000.00 on or before one year; the sum of \$2000.00 on or before two years; the sum of \$2200.00 on or before three years, with interest at the rate of 7% per annum, payable semi-annually." In affirming the judgment of the Superior Court which allowed interest on the entire sum, the Supreme Court said (at page 665):

"* * * It would be doing violence to accepted rules of construction to uphold the contention that the parties by their agreement manifestly intended to exclude the installments in question from the payment of interest and intended that only the first and fourth installments should bear interest. *A principle of construction well settled is that where one construction would make a contract unusual and extraordinary, and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail.*"

Stoddart v. Golden, 179 Cal. 663, 665.

See, also:

Stein v. Archibald, 151 Cal. 220, 223;

Caletti v. State, 45 Cal. App. 2d 302.

XII.

Where It Is Clear From the Record, as It Is Here, That Plaintiffs Cannot Prove an Applicable Contract, Custom or Practice Making the Services for Which They Seek Recovery Compensable, Not Only Is It the Duty of the Court to Dismiss the Proceedings, but Such Action Will Be Beneficial to Both Parties and Will Save Them the Time and Expense of Prolonged Litigation.

In *Johnson v. Park City Consolidated Mines Co.* (D. C., Mo., 1947), 73 Fed. Supp. 852, 857-858, the court in dismissing, after the effective date of the Portal-to-Portal Act, a suit for overtime compensation, said, in part:

“This action involves a large number of records and employees. It would require expenditure of large sums of money and time to get ready for trial and the trial would be long, in fact might even call for a master. Why go through such procedure, as suggested by plaintiffs, to reach a position that is now obvious from the record. If plaintiffs can prove a contract or custom as called for by the amended Act it should not be kept secret until the trial. Likewise if they cannot produce such evidence that should not be kept secret until the trial.”

Johnson v. Park City Consolidated Mines Co.
(D. C. Mo., 1947), 73 Fed. Supp. 852, 857-858.

In *Sadler, et al., v. W. S. Dickey Clay Mfg. Co.* (D. C., Mo., 1948), 78 Fed. Supp. 616, 618-619, the court in dismissing the suit for overtime compensation, said, in part:

“In light of the fact that plaintiffs, after being afforded an opportunity so to do, have failed to set forth or refer to any express provision of a con-

tract, or allege in their amended complaint any facts which establish the existence of a custom or practice under which the activities here asserted by them are made compensable; and, it now being made to appear that such matters do not in fact exist, we believe that defendant's motion to dismiss this action should be sustained. The expense of preparing this case for trial would be burdensome to all parties. At a trial on the merits, facts appearing such as are now made to appear in defendant's motion to dismiss, this Court would be compelled to then dismiss this action. The general allegations contained in the amended complaint should not, under the circumstances of this case, be held to be sufficient to cause the parties to undertake the burden of expense of preparing this case for trial when such a ruling seems evident and inevitable."

Sadler, et al., v. W. S. Dickey Clay Mfg. Co.,
(D. C. Mo., 1948), 78 Fed. Supp. 616, 618-619.

In *Smith v. Cudahy Packing Co.* (D. C. Minn., 1947), 76 Fed. Supp. 575, appeal dismissed 172 F. 2d 223, the court in granting defendants' motion for summary judgment said, in part:

"It seems to me that no good can be accomplished by assuming facts to exist that are not disclosed by the complaint or affidavits now on file. The amendment to the complaint does not attach any existing written contract, nor does it give any adequate factual description of nonwritten contracts or custom or practice. *Story v. Todd Houston Shipbuilding Corporation*, D. C., 72 F. Supp. 690.

"An orderly administration of justice, considering all the facts and circumstances, seems to oppose the necessity of requiring a trial of the large number of

claims here involved, and the expense incident thereto. The time consumed by all concerned would be considerable. The record would be large. Plaintiffs' insistence on jury trials seems inadvisable."

Smith v. Cudahy Packing Co. (D. C. Minn., 1947),
76 Fed. Supp. 575, 581, appeal dismissed 172
F. 2d 223.

In *Finn, et al., v. Bethlehem Steel Company* (D. C. Mass., 1948), 15 Labor Cases, par. 64,592, p. 73,847, the District Court of Massachusetts said:

"Merely suggesting that the activities for which compensation is sought were compensable by the express provisions of a contract of employment is not sufficient to show the jurisdiction of this Court. *The plaintiffs in this case are numerous, and the records of the defendant must be subject to much search and scrutiny by both parties before trial. It is therefore quite essential that jurisdiction should be clearly established before proceeding with such a vast task.*"

Finn, et al., v. Bethlehem Steel Company (D. C. Mass., 1948), 15 Labor Cases, par. 64,592, p. 73,847.

See, also:

Piantadosi v. Loew's Inc. (C. C. A. 9), 137 F. 2d 534, 536;

Plummer v. Minn., etc. (D. C., Minn., 1948), 76 Fed. Supp. 745, 746;

Carr v. Goodyear, etc. (D. C. S. D., Calif., 1945), 64 Fed. Supp. 40, 51;

Bartels, et al., v. Sperti, etc. (D. C. N. Y., 1947), 73 Fed. Supp. 751, 756-757;

Hornbeck v. Dain, etc. (D. C. Ia., 1947), 7 F. R. D. 605, 606-607;

Werner v. Milwaukee Solvay Coke Co. (Wis. Sup. Ct., 1948), 31 N. W. 2d 605, 606.